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THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1997 CUMULATIVE SUPPLEMENT

Volume 13

Chapters 90 through 97

Prepared under the supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 486 S.E.2d 626. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 13 contains the general laws of a permanent nature enacted by the General Assembly through the 1997 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1997 Regular Session affecting Chapters 90 through 97 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 344, p. 732.
North Carolina Court of Appeals Reports through Volume 123, p. 790.
South Eastern Reporter 2nd Series through Volume 486, p. 626.
Federal Reporter 3rd Series through Volume 116, p. 875.
Federal Supplement through Volume 965, p. 1486.
Federal Rules Decisions through Volume 172, p. 600.
Bankruptcy Reports through Volume 209, p. 549.
Supreme Court Reporter through Volume 117, p. 1864.
North Carolina Law Review through Volume 75, p. 1088.
Wake Forest Law Review through Volume 32, p. 217.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

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VOLUME 13

Chapter 90.

Editor's Note. — The legislation and annotations affecting Chapter 90 have been included in a recently published replacement chapter.

Chapter 90A.

Editor's Note. — The legislation and annotations affecting Chapter 90A have been included in a recently published replacement chapter.

Chapter 90B.

Social Worker Certification Act.

Sec.
90B-6. Functions and duties of the Certification Board.
90B-10. Exemption from certain requirements.
90B-12. Violation a misdemeanor.

§ 90B-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90B-5. North Carolina Certification Board for Social Work; appointments; terms; composition.

Editor's Note. —

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1991, c. 732, s. 8, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 24.11, provides: "The term of the additional Board position for clinical social worker created by this act shall commence upon the expiration of the term of the public member whose term expires first."

§ 90B-6. Functions and duties of the Certification Board.

(a) The Board shall administer and enforce the provisions of this Chapter.

(b) The Board shall elect from its membership, a chairperson, a vice-chairperson, and secretary-treasurer, and adopt rules to govern its proceedings. A majority of the membership shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for certificates under this Chapter, and shall issue a certificate to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all certificates issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. No State appropriations shall be subject to the administration of the Board.

(f) The Board shall establish and receive fees not to exceed fifty dollars ($50.00) for initial or renewal application. Fees for the national written examination shall be the cost of the examination to the Board plus an additional fee not to exceed fifty dollars ($50.00). The fee for late renewal shall not exceed fifteen dollars ($15.00). The

Board shall maintain accounts of all receipts and make expenditures from Board receipts for any purpose which is reasonable and necessary for the proper performance of its duties under this Chapter.

(g) The Board shall have the power to establish or approve study or training courses and to establish reasonable standards for certification and certificate renewal, including but not limited to the power to adopt or use examination materials and accreditation standards of the Council on Social Work Education or other recognized accrediting agency and the power to establish reasonable standards for continuing social work education; provided that for certificate renewal no examination shall be required; provided further, that the Board shall not have the power to withhold approval of study or training courses offered by a college or university having a social work program approved by the Council on Social Work Education.

(h) Subject to the provisions of Chapter 150B of the General Statutes, the Board shall have the power to adopt, amend, or rescind rules and regulations to carry out the purposes of this Chapter, including but not limited to the power to adopt ethical and disciplinary standards. (1983, c. 495, s. 1; 1987, c. 827, s. 1; 1995, c. 344, s. 1.)

Editor's Note. — Session Laws 1995, c. 344, s. 1, which amended this section, was effective July 1, 1995 and applicable to fees due on or after that date.

§ 90B-10. Exemption from certain requirements.

(a) Applicants who were engaged in the practice of social work before January 1, 1984, shall be exempt from the academic qualifications required by this act for Certified Social Workers and Certified Social Work Managers and shall be certified upon passing the Board examination and meeting the experience requirements, if any, for certification of persons in that classification.

(b) The following may engage in clinical social work practice without meeting the requirements of G.S. 90B-7(d):

(1) A person who has engaged in clinical social work practice for one year prior to the effective date of this act and who properly applies for and pays the required fees for a certificate as a certified clinical social worker prior to January 1, 1993. Notwithstanding the foregoing provision of this subdivision, any applicant who applied for certification pursuant to this subdivision between December 1, 1993, and January 15, 1994, and who is otherwise eligible for certification under this subdivision but for the January 1, 1993, deadline shall be certified.

(2) A student completing a clinical requirement for graduation while pursuing a course of study in social work in an institution accredited by or in candidacy status with the Council on Social Work Education.

(3) An employee engaged in clinical social work practice exclusively for one of the following employers:

   a. **(Effective until January 1, 1999)** The State, a political subdivision of the State, or a local government.

   b. A hospital or health care facility licensed pursuant to Article 2 of Chapter 122C of the General Statutes or

§ 90B-10 has a delayed effective date. See notes.

Articles 5 and 6 of Chapter 131E of the General Statutes. (1983, c. 495, s. 1; 1991, c. 732, s. 5; 1993 (Reg. Sess., 1994), c. 745, s. 38.1; 1996, 2nd Ex. Sess., c. 18, s. 24.11; 1997-443, s. 11.31.)

Editor's Note. — Session Laws 1991, c. 732, s. 8, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 24.11, provides: "G.S. 90B-10(b)(3)a. is repealed effective January 1, 1999."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

The 1997 amendment, effective July 1, 1997, purported to extend the repeal date of subdivision (b)(3)a. to January 1, 1999; however, this change was previously made by Session Laws 1996, 2nd Ex. Sess., c. 18, s. 24.11, effective July 1, 1996.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective July 1, 1996, amended Session Laws 1991, c. 732, s. 8, by changing the repeal date of subdivision (b)(3)a. to January 1, 1999.

§ 90B-12. Violation a misdemeanor.

Any person violating any provision of this Chapter is guilty of a Class 2 misdemeanor. (1983, c. 495, s. 1; 1993, c. 539, s. 654; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 654, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 90C.

Therapeutic Recreation Personnel Certification Act.

Sec.
90C-4. Definitions.
90C-5. State Board of Therapeutic Recreation Certification created.
90C-7. Executive Director.
90C-9. Requirements for certification.

§ 90C-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90C-4. Definitions.

In this Chapter, unless the context otherwise requires, the following definitions shall apply:

(1) "Board" shall mean the State Board of Therapeutic Recreation Certification.

(2) "Certified Therapeutic Recreation Assistant" means a person who holds a certificate pursuant to this Chapter as a therapeutic recreation assistant to act under the general supervision of or with consultation from a Certified Therapeutic Recreation Specialist.

(3) "Certified Therapeutic Recreation Specialist" means a person who holds a certificate pursuant to this Chapter as a therapeutic recreation specialist.

(4) "Person" means any individual, corporation, partnership, association, unit of government, or other legal entity.

(5) "Scope of Therapeutic Recreation" includes all direct client services of consultation, research, planning, design, and implementation of specific programs for either individuals or groups that require specific therapeutic recreation education, training, and experience as defined in this Chapter.

(6) "Therapeutic Recreation" is the use of recreation services that improve, develop, and/or maintain physical, psychological, emotional, and/or social behaviors that assist individuals in establishing and expressing an independent lifestyle.

Comprehensive therapeutic recreation services involve a continuum of care, including:

a. Therapy which uses recreation services or opportunities designed as treatment;

b. Leisure education which provides opportunities for acquisition of leisure skills, attitudes, and values; and/or

c. Recreation which provides opportunities for voluntary participation in leisure activities.

Persons certified under this Chapter may practice in clinical, residential or community settings and may:

a. Assess and record the client's individual needs, interests, and abilities;

b. Design and implement appropriate therapeutic recreation services for the client; and

c. Evaluate, record, and report the client's response to the therapeutic recreation services rendered. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1997-456, s. 27.)

Editor's Note. — Subdivisions (a) through (f) were renumbered as subdivisions (1) through (6), and subdivisions under subdivision (6) were redesignated accordingly, pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 90C-5. State Board of Therapeutic Recreation Certification created.

(a) The North Carolina State Board of Therapeutic Recreation Certification is created.

(b) Composition. — The Board shall consist of seven members appointed as follows:

(1) Three practicing therapeutic recreation specialists, one each appointed by the Governor, the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and the General Assembly upon the recommendation of the Speaker of the House of Representatives;

(2) One therapeutic recreation specialist who is engaged primarily in providing training for therapeutic recreation specialists or therapeutic recreation assistants and one therapeutic recreation assistant, each appointed by the Governor; and

(3) Two public members, one appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and one appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

The Governor shall make his initial appointments after consultation with the North Carolina Recreation and Park Society and other interested persons and thereafter shall make his appointments after consultation with the Board.

(c) Qualifications. — The nonpublic members of the Board shall hold a current certificate. Each nonpublic member of the Board, at the time of his appointment and for at least two years before, shall have been actively engaged in North Carolina in the practice of therapeutic recreation, or in the education and training of graduate or undergraduate students of therapeutic recreation, or in therapeutic recreation research. The first nonpublic members of this Board shall immediately become certified by complying with the provisions of this Chapter.

A public member shall not be a licensed health care professional or an agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this subsection, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall not be eligible to serve as a public member of the Board. The spouse of any person who would be prohibited by this subsection from serving on the Board as a public member shall not serve as a public member of the Board. Public members shall reasonably reflect the population of this State.

(d) Term. — Each member shall be appointed for a term of three years and shall serve until a successor is appointed. Of the members initially appointed, one practicing therapeutic recreation specialist appointed by the Governor, and one public member appointed by the General Assembly upon the recommendation of the President of the Senate shall continue in office for one year; one therapeutic recreation specialist appointed by the General Assembly upon the recommendation of the President of the Senate, one therapeutic recreation assistant appointed by the Governor, and one public member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall continue in office for two years; and one therapeutic recreation specialist appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives and one therapeutic recreation specialist engaged primarily in the education of therapeutic recreation specialists or therapeutic recreation assistants appointed by the Governor shall continue in office for three years. The terms of all initial appointments shall commence on June 30, 1987. No member shall serve more than two consecutive full terms.

(e) Vacancies. — The Governor shall fill vacancies to the Board positions for which he is the appointing authority within 30 days after a position is vacated. The General Assembly shall fill vacancies for which it is the appointing authority in accordance with G.S. 120-122. Appointees shall serve the remainder of the unexpired term and until their successors have been appointed and qualified.

(f) Removal. — The Board may remove any of its members for gross neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved. The Governor may also remove any member for gross neglect of duty, incompetence, or unprofessional conduct.

(g) Compensation. — Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing Board members generally, as provided in G.S. 93B-5.

(h) Officers. — The officers of the Board shall be a chairman, a vice-chairman and other officers deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(i) Meetings. — The Board shall hold at least two meetings each year to conduct business, and shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of the Board members shall constitute a quorum.

(j) Employees. — The Board may employ necessary personnel for the performance of its functions, and fix their compensation, within the limits of the funds available to the Board.

(k) The total expense of the administration of this Chapter shall not exceed the total income from fees collected pursuant to this Chapter. None of the expenses of the Board, or the compensation or expenses of any officer or any employee of the Board shall be paid or payable out of the general fund. Neither the Board nor any of its officers or employees may incur any expense, debt, or other financial obligation binding upon the State. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1995, c. 490, s. 59.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment added "Pro Tempore" in subdivisions (b)(1) and (b)(3). For the applicability of this amendment, see editor's note.

§ 90C-7. Executive Director.

The Executive Director shall deposit all fees payable to the Board in financial institutions designated by the Board as official depositories. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Chapter. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1987, c. 23, s. 1; 1993, c. 257, s. 6.)

§ 90C-9. Requirements for certification.

(a) An applicant shall be certified upon satisfactorily showing to the Board that he is competent and knowledgeable about the practice of therapeutic recreation as provided by rules and regulations of the Board.

(b) The Board shall certify any person as a "therapeutic recreation specialist" who meets the following education and experience requirements:

(1) A baccalaureate degree or higher from an accredited college or university with a major in therapeutic recreation or a major in recreation and an option in therapeutic recreation which includes a field placement requirement; or

(2) A baccalaureate degree or higher from an accredited college or university with a major in recreation and two years of full-time experience in a clinical, residential, or community-based therapeutic recreation program; or

(3) A baccalaureate degree or higher from an accredited college or university in one of the recreation-related or allied health fields and five years of full-time experience in a clinical, residential, or community-based therapeutic recreation program. Transcripts must show evidence of 18 semester hours or 27 quarter hours of upper division credits in therapeutic recreation/recreation course work and evidence of appropriate support courses; and

(4) Passing the Board examination for certification in this classification.

(b1) For purposes of this section [subsection (b) of this section], "an option in therapeutic recreation" shall include:

(1) A minimum of three courses dealing exclusively with therapeutic recreation content;

(2) A minimum of three courses dealing exclusively with recreation content;

(3) Completion of a 360-hour field placement experience in a clinical, residential, or community-based therapeutic recreation program under an agency supervisor who is certified by the Board; and

(4) Completion of supportive course work to include a minimum of 18 semester or 27 quarter hours from four of these six areas: psychology, sociology, physical/biological science, special education, human services, and/or adapted physical education.

(c) The Board shall certify any person as a "therapeutic recreation assistant" who meets the following education and experience requirements:

(1) An associate of arts degree from an accredited educational institution with a major in therapeutic recreation or a major in recreation and an option in therapeutic recreation which includes a field placement requirement; or

(2) An associate or arts degree from an accredited educational institution with a major in recreation and one year of full-time experience in a clinical, residential, or community-based therapeutic recreation program; or

(3) An associate of arts degree or higher from an accredited educational institution with a major in one of the skill areas (arts, dance, drama, music, physical education) and one year of full-time experience in a clinical, residential or community-based therapeutic recreation program; or

(4) Completion of the National Therapeutic Recreation 750-Hour Training Program for therapeutic recreation personnel, with verification by an official certificate of completion; or

(5) Four years of full-time experience in a clinical, residential, or community-based therapeutic recreation program; and

(6) Passing the Board examination for certification in this classification.

(c1) For purposes of subsection (c) of this section, "an option in therapeutic recreation" shall include:

(1) A minimum of two courses dealing exclusively with therapeutic recreation content;

(2) A minimum of two courses dealing exclusively with recreation content;

(3) Completion of a 360-hour field placement experience in a clinical, residential, or community-based therapeutic recreation program under an agency supervisor who is certified by the Board; and

(4) Completion of supportive course work to include a minimum of 12 semester or 18 quarter hours selected from psychology, sociology, physical/biological sciences, human services, and physical education activity classes.

(d) The Board may certify any person as a "therapeutic recreation specialist (provisional)" any person who meets the educational requirements of subsection (b) of this section while he is acquiring the experience required for certification or recertification. This certificate may be issued for a period of two years and may not be renewed, except in extraordinary circumstances upon unanimous vote of the Board. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1997-456, s. 27.)

Editor's Note. — The second subdivisions (b) and (c) were renumbered as subdivisions (b1) and (c1) pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Chapter 91A.

Pawnbrokers Modernization Act of 1989.

Sec.
91A-8. Pawnbroker fees; interest rates.
91A-11. Penalties.

§ 91A-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 91A-8. Pawnbroker fees; interest rates.

No pawnbroker shall demand or receive an effective rate of interest greater than two percent (2%) per month, and no other charge of any description or for any purpose shall be made by the pawnbroker, except that the pawnbroker may charge, contract for, and recover an additional monthly fee for the following services, including but not limited to:

(1) Title investigation;
(2) Handling, appraisal, and storage;
(3) Insuring a security;
(4) Application fee;
(5) Making daily reports to local law enforcement officers; and
(6) For other expenses, including losses of every nature, and all other services.

In no event may the total of the above listed monthly fees on a pawn transaction exceed twenty percent (20%) of the principal up to a maximum of the following:

First month	$100.00
Second month	75.00
Third month	75.00
Fourth month and thereafter	50.00

In addition, pawnbrokers may charge fees for returned checks as allowed by G.S. 25-3-506. (1989, c. 638, s. 2; 1995 (Reg. Sess., 1996), c. 742, s. 37.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "25-3-506" for "25-3-512" at the end of the section.

§ 91A-11. Penalties.

(a) Every person, firm, or corporation, their guests or employees, who shall knowingly violate any of the provisions of this Chapter, shall, on conviction thereof, be deemed guilty of a Class 2 misdemeanor. If the violation is by an owner or major stockholder or managing partner of the pawnshop and the violation is knowingly committed by the owner, major stockholder, or managing partner of the pawnshop, then the license of the pawnshop may be suspended at the discretion of the court.

(b) The provision of subsection (a) shall not apply to violations of G.S. 91A-10(6) which shall be prosecuted under the North Carolina criminal statutes.

(c) Any contract of pawn the making or collecting of which violates any provision of this Chapter, except as a result of accidental or bona fide error of computation, shall be void, and the licensee shall have no right to collect, receive or retain any interest or fee whatsoever with respect to such pawn. (1989, c. 638, s. 2; 1993, c. 539, s. 655; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 655, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 93.

Editor's Note. — The legislation and annotations affecting Chapter 93 have been included in a recently published replacement chapter.

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

Sec.
93A-1. License required of real estate brokers and real estate salesmen.
93A-2. Definitions and exceptions.
93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.
93A-11. Reimbursement by real estate independent contractor of brokers' workers' compensation.

ARTICLE 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

From and after July 1, 1957, it shall be unlawful for any person, partnership, corporation, limited liability company, association, or other business entity in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman or to advertise or hold himself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission (hereinafter referred to as the Commission), under the provisions of this Chapter. (1957, c. 744, s. 1; 1969, c. 191, s. 1; 1983, c. 81, ss. 1, 2; 1995, c. 351, s. 19.)

CASE NOTES

One who conducts activities pursuant to a finder's fee contract is engaged indirectly in the business of being a real estate broker or salesperson. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

§ 93A-2. Definitions and exceptions.

(a) A real estate broker within the meaning of this Chapter is any person, partnership, corporation, limited liability company, association, or other business entity who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others.

(b) The term real estate salesman within the meaning of this Chapter shall mean and include any person who under the supervision of a real estate broker, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions set out or comprehended by the foregoing definition of real estate broker.

(c) The provisions of this Chapter shall not apply to and shall not include:

(1) Any person, partnership, corporation, limited liability company, association, or other business entity who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where the acts are performed in the regular course of or as incident to the management of that property and the investment therein;
(2) Any person acting as an attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease or exchange of real estate;
(3) The acts or services of an attorney-at-law;
(4) Any person, while acting as a receiver, trustee in bankruptcy, guardian, administrator or executor or any person acting under order of any court;
(5) Any person, while acting as a trustee under a trust agreement, deed of trust or will, or his regular salaried employees;
(6) Any salaried person employed by a licensed real estate broker, for and on behalf of the owner of any real estate or the improvements thereon, which the licensed broker has contracted to manage for the owner, if the salaried employee is limited in his employment to: exhibiting units on the real estate to prospective tenants; providing the prospective tenants with information about the lease of the units; accepting applications for lease of the units; completing and executing preprinted form leases; and accepting security deposits and rental payments for the units only when the deposits and rental payments are made payable to the owner or the broker employed by the owner. The salaried employee shall not negotiate the amount of security deposits or rental payments and shall not negotiate leases or any rental agreements on behalf of the owner or broker; or
(7) Any owner who personally leases or sells his own property. (1957, c. 744, s. 2; 1967, c. 281, s. 1; 1969, c. 191, s. 2; 1975, c. 108; 1983, c. 81, ss. 4, 5; 1985, c. 535, s. 1; 1995, c. 351, s. 20.)

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Commission on such forms as are prescribed by the Commission. Each applicant for a license as a real estate broker or real estate salesman shall be at least 18 years of age. Each applicant for a license as a real estate salesman shall, within five years preceding the date application is made, have satisfactorily completed, at a school approved by the Commission, a real estate fundamentals course consisting of at least 30 hours of classroom instruction in subjects determined by the Commission, or possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the course. Each applicant for a license as a real estate broker shall, within five years preceding the date the application is made, either have been actively engaged on a full-time basis as a licensed real estate salesman for at least two years, or have satisfactorily completed, at a school approved by the Commission, advanced courses in Real Estate Law, Real Estate Finance, and Real Estate Brokerage Operations, each consisting of at least 30 hours of classroom instruction, these courses to be in addition to those required for a real estate salesman license, or possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the above requirements. Each application for license as a real estate broker shall be accompanied by a fee, fixed by the Commission but not to exceed thirty dollars ($30.00). Each application for license as a real estate salesman shall be accompanied by a fee, fixed by the Commission but not to exceed thirty dollars ($30.00).

(b) Any person who files such application to the Commission in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant.

The Commission may make such investigation as it deems necessary into the ethical background of the applicant. If the results of the examination and investigation shall be satisfactory to the Commission, then the Commission shall issue to such a person a license, authorizing such person to act as a real estate broker or real estate salesman in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law.

Provided, however, that any person who, at the time of the passage or at the effective date of this Chapter, has a license to engage in, and is engaged in business as a real estate broker or real estate salesman and who shall file a sworn application with the Commission setting forth his qualifications, including a statement that such applicant has not within five years preceding the filing of the application been convicted of any felony or any misdemeanor involving moral turpitude, shall not be required to take or pass such examination, but all such persons shall be entitled to receive such license from the Commission under the provisions of this Chapter on proper application therefor and payment of a fee of ten dollars ($10.00).

(c) All licenses issued by the Commission under the provisions of this Chapter shall expire on the 30th day of June following issuance or on any other date that the Commission may determine and shall become invalid after that date unless reinstated. A license may be renewed 45 days prior to the expiration date by filing an application with and paying to the Executive Director of the Commission the license renewal fee. The license renewal fee is thirty dollars ($30.00) unless the Commission sets the fee at a higher amount. The Commission may set the license renewal fee at an amount that does not exceed fifty dollars ($50.00). The license renewal fee may not increase by more than five dollars ($5.00) during a 12-month period.

The Commission may adopt rules establishing a system of license renewal in which the licenses expire annually with varying expiration dates. These rules shall provide for prorating the annual fee to cover the initial renewal period so that no licensee shall be charged an amount greater than the annual fee for any 12-month period. All licenses reinstated after the expiration date thereof shall be subject to a late filing fee of five dollars ($5.00) in addition to the required renewal fee. In the event a licensee fails to obtain a reinstatement of such license within 12 months after the expiration date thereof, the Commission may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Commission upon payment of a fee of five dollars ($5.00) by the licensee. Commission certification of a licensee's license history shall be made only after the payment of a fee of ten dollars ($10.00).

(d) The Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Commission is further authorized to adopt rules and regulations necessary for the approval of real estate schools and such rules and regulations may, in accordance with G.S. 93A-4(a), prescribe specific requirements pertaining to the teaching of mechanics and law governing real estate transactions at such schools.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Commission nor any licensee of the Commission as authorizing any licensee whether by examination or under the grandfather clause or by comity to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5; 1983, c. 81, ss. 2, 9, 11; c. 384; 1985, c. 535, ss. 2-5; 1995, c. 22, s. 1.)

Editor's Note. — Session Laws 1995, c. 22, s. 1, which amended this section, was effective April 4, 1995 and applicable to applications for a license or for renewal of a license filed on or after that date.

§ 93A-6. Disciplinary action by Commission.

CASE NOTES

Failure to Check Federal Flood Hazard Maps. — Because mere inaction does not constitute negligence in the absence of a duty to act and real estate agent was under no duty to search the federal flood hazard maps, the fact that she did not search these maps, discover that the property was located in a flood plain, and inform plaintiffs could not constitute a negligent omission under subdivision (a)(1). Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994).

Cited in Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

§ 93A-11. Reimbursement by real estate independent contractor of brokers' workers' compensation.

(a) Notwithstanding the provisions of G.S. 97-21 or any other provision of law, a real estate broker may include in the governing contract with a real estate salesman whose nonemployee status is recognized pursuant to section 3508 of the United States Internal Revenue Code, 26 U.S.C. § 3508, an agreement for the salesman to reimburse the broker for the cost of covering that salesman under the broker's workers' compensation coverage of the broker's business.

(b) Nothing in this section shall affect a requirement under any other law to provide workers' compensation coverage or in any manner exclude from coverage any person, firm, or corporation otherwise subject to the provisions of Article 1 of Chapter 97 of the General Statutes. (1995, c. 127, s. 1.)

Editor's Note. — Session Laws 1995, c. 127, s. 2, provides that this section is effective upon ratification (May 30, 1995) and applies to any governing contract between a real estate broker and a real estate salesman entered into on or after that date.

Chapter 93B.
Occupational Licensing Boards.

Sec.
93B-12. Information from licensing boards having authority over health care providers.
93B-13. (Expires June 30, 1998) Revocation when licensing privilege forfeited for nonpayment of child support or for failure to comply with subpoena.
93B-14. (Expires June 30, 1998) Information on applicants for licensure.

§ 93B-1. Definitions.

Editor's Note. —

Session Laws 1997-443, s. 32.11 provides: "The Department of Transportation may enter into a design-build-warrant contract to develop, with Federal Highway Administration participation under The 1991 Intermodal Surface Transportation Efficiency Act, Title VI, Part B, Sections 6051-6059, a 'Congestion Avoidance and Reduction for Autos and Trucks (CARAT)' system of traffic management for the greater Charlotte-Mecklenburg urban areas. Notwithstanding any other provision of the law, contractors, contractors' employees, and Department of Transportation employees involved in this project only do not have to be licensed by occupational licensing boards as 'license' and 'occupational licensing board' are defined in G.S. 93B-1; and for the purpose of entering into contracts, the Department of Transportation is exempted from the provisions of the following General Statutes: G.S. 136-28.1, 143-52, 143-53, 143-58, 143-128, and 143-129. These statutory exemptions are limited and available only to the extent necessary to comply with federal rules, regulations, and policies for completion of this project.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

"The Department of Transportation shall report quarterly to the Joint Legislative Transportation Oversight Committee on its efforts to enter into a design-build-warrant contract and to award and construct the project. The report shall include, but not be limited to, the number of types of firms bidding on the project, special qualifications of the firms bidding, and the effect statutory exemptions might have had on the award and construction of the project and the receipt of federal discretionary funding for the project."

§ 93B-12. Information from licensing boards having authority over health care providers.

(a) Every occupational licensing board having authority to license physicians, physician assistants, nurse practitioners, and nurse midwives in this State shall modify procedures for license renewal to include the collection of information specified in this section for each board's regular renewal cycle. The purpose of this requirement is to assist the State in tracking the availability of health care providers to determine which areas in the State suffer from inequitable access to specific types of health services and to anticipate future health care shortages which might adversely affect the citizens of this State. Occupational licensing boards shall collect, report, and update the following information:

(1) Area of health care specialty practice;

(2) Address of all locations where the licensee practices; and

(3) Other information the occupational licensing board deems relevant to assisting the State in achieving the purpose set out in this section, including social security numbers for research purposes only in matching other data sources.

(b) Every occupational licensing board required to collect information pursuant to subsection (a) of this section shall report and update the information on an annual basis to the Department of Health and Human Services. The Department shall provide this information to programs preparing primary care physicians, physicians assistants, and nurse practitioners upon request by the program and by the Board of Governors of The University of North Carolina. Information provided by the occupational licensing board pursuant to this subsection may be provided in such form as to omit the identity of the health care licensee. (1995, c. 507, s. 23A.4; 1996, 2nd Ex. Sess., c. 17, s. 16.4; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in subsection (b).

§ 93B-13. (Expires June 30, 1998) Revocation when licensing privilege forfeited for nonpayment of child support or for failure to comply with subpoena.

(a) Upon receipt of a court order, pursuant to G.S. 50-13.12, revoking the occupational license of a licensee under its jurisdiction, an occupational licensing board shall note the revocation in its records and follow the normal postrevocation rules and procedures of the board as if the revocation had been ordered by the board. The revocation shall remain in effect until the board receives certification by the clerk of superior court that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation.

(b) Upon receipt of notification from the Department of Health and Human Services that a licensee under an occupational licensing board's jurisdiction has forfeited the licensee's occupational license pursuant to G.S. 110-142.1, then the occupational licensing board shall send a notice of intent to revoke or suspend the occupational license of that licensee as provided by G.S. 110-142.1(d). If the license is revoked as provided by the provisions of G.S. 110-142.1, the revocation shall remain in effect until the board receives certification by the designated representative or the child support enforcement agency that the licensee is no longer delinquent in child support payments, or, as applicable, that the licensee is in compliance with or no longer subject to a subpoena that was the basis for the revocation.

(c) If at the time the court revokes a license pursuant to subsection (a) of this section, or if at the time the occupational licensing board revokes a license pursuant to subsection (b) of this section, the

§ 93B-13 has a delayed expiration date. See notes.

occupational licensing board has revoked the same license under the licensing board's disciplinary authority over licensees under its jurisdiction, and that revocation period is greater than the revocation period resulting from forfeiture pursuant to G.S. 50-13.12 or G.S. 110-142.1 then the revocation period imposed by the occupational licensing board applies.

(d) Immediately upon certification by the clerk of superior court or the child support enforcement agency that the licensee whose license was revoked pursuant to subsection (a) or (b) of this section is no longer delinquent in child support payments, the occupational licensing board shall reinstate the license. Immediately upon certification by the clerk of superior court or the child support enforcement agency that the licensee whose license was revoked because of failure to comply with a subpoena is in compliance with or no longer subject to the subpoena, the occupational licensing board shall reinstate the license. Reinstatement of a license pursuant to this section shall be made at no additional cost to the licensee. (1995, c. 538, s. 1.3; 1997-433, s. 5.4; 1997-443, s. 11A.118(a).)

Editor's Note. —

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-443, s. 5.4, effective October 1, 1997, inserted "or for failure to comply with subpoena" in the catchline; inserted "or, as applicable, that the licensee is in compliance with or is no longer subject to the subpoena that was the basis for the revocation" in subsection (a); inserted "or, as applicable, that the licensee is in compliance with or no longer subject to a subpoena that was the basis for the revocation" in subsection (b); and inserted the second sentence of subsection (d).

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in the first sentence of subsection (b).

§ 93B-14. (Expires June 30, 1998) Information on applicants for licensure.

Every occupational licensing board shall require applicants for licensure to provide to the Board the applicant's social security number. This information shall be treated as confidential and may be released only to the State Child Support Enforcement Program of the Department of Health and Human Services upon its request and for the purpose of enforcing a child support order. (1997-433, s. 4.6; 1997-443, s. 11A.122.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides "This act shall be known as "The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997.

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-443, s. 11A.122, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources."

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.
93D-6. Persons selling in other jurisdictions.
93D-15. Violation of Chapter.

§ 93D-1. Definitions.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Chapter are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, but shall be required to pay an application fee to the Board in an amount set by the Board, not to exceed one hundred fifty dollars ($150.00). Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2; 1981, c. 990, s. 2; 1991, c. 592, s. 3; 1991 (Reg. Sess., 1992), c. 1030, s. 24.)

§ 93D-15. Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a Class 2 misdemeanor. (1969, c. 999; 1981, c. 601, s. 20; 1993, c. 539, s. 660; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 660, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 93E.

North Carolina Appraisers Act.

Article 1.

Real Estate Appraiser.

Sec.
93E-1-5. Appraisal Board.

ARTICLE 1.

Real Estate Appraiser.

§ 93E-1-5. Appraisal Board.

(a) There is created the North Carolina Appraisal Board for the purposes set forth in this Chapter. The Board shall consist of seven members. The Governor shall appoint five members of the Board, and the General Assembly shall appoint two members in accordance with G.S. 120-121, one upon the recommendation of the President Pro Tempore of the Senate and one upon the recommendation of the Speaker of the House of Representatives. Each member appointed by the Governor shall be appointed from a different congressional district. The appointee recommended by the Speaker of the House of Representatives and the appointees of the Governor shall be persons who have been engaged in the business of real estate appraising in this State for at least five years immediately preceding their appointment and are also State-licensed or State-certified real estate appraisers. No more than four of the appointees may be members of the same appraiser trade organization, group, or committee at any one time. The appointee recommended by the President Pro Tempore of the Senate shall be a person not involved directly or indirectly in the real estate, real estate appraisal, or the real estate lending industry. Members of the Board shall serve three-year terms, so staggered that the terms of three members expire in one year, the terms of two members expire in the next year, and the terms of two members expire in the third year of each three-year period. The members of the Board shall elect one of their members to serve as chairman of the Board for a term of one year. The Governor may remove any member of the Board appointed by the Governor for misconduct, incompetency, or neglect of duty. The General Assembly may remove any member appointed by it for the same reasons. Successors shall be appointed by the appointing authority making the original appointment. All vacancies occurring on the Board shall be filled, for the unexpired term, by the appointing authority making the original appointment. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Initial terms of office commence July 1, 1994.

(b) The Board is an occupational licensing agency governed by Chapter 150B of the General Statutes; its decisions are final agency decisions subject to judicial review under Article 4 of Chapter 150B of the General Statutes.

(c) Members of the Board shall be paid the per diem, subsistence, and travel allowances at the rates set forth in G.S. 93B-5; provided that none of the expenses of the Board or the compensation or expenses of any officer or employee thereof shall be payable out of the treasury of the State of North Carolina; the total expenses of the administration of this Chapter shall not exceed the total income therefrom; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina.

(d) The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Appraisal Board". Copies of all papers in the office of the Board duly certified and authenticated by the seal of the Board shall be received in evidence in all courts and administrative bodies and with like effect as the originals.

(e) The Board may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules that the Board may promulgate. The Board shall fix salaries. The Board shall have the authority to issue to its employees credentials or other means of identification.

(f) The Board shall be entitled to the services of the Attorney General in connection with the affairs of the Board or may, in its discretion, employ an attorney to assist or represent it in the enforcement of this Chapter.

(g) The Board may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter. (1993, c. 419, s. 6; 1995, c. 482, s. 5; 1996, 2nd Ex. Sess., c. 15, s. 16.)

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, substituted "four of the appointees" for "three of the appointees" in the sixth sentence of subsection (a).

Chapter 94.

Apprenticeship.

§ 94-6. Definition of an apprentice.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

Chapter 95.

Department of Labor and Labor Regulations.

Article 2A.

Wage and Hour Act.

Sec.
95-25.3. Minimum wage.
95-25.5. Youth employment.
95-25.14. Exemptions.

Article 3.

Various Regulations.

95-28. [Repealed.]
95-28.1A. Discrimination against persons based on genetic testing or genetic information prohibited.
95-28.3. Leave for parent involvement in schools.

Article 5A.

Regulation of Private Personnel Services.

95-47.4. Contracts; contents; approval; tying contracts forbidden.
95-47.7. Private Personnel Service Advisory Council.

Article 6.

Separate Toilets for Sexes.

95-48 through 95-53. [Repealed.]

Article 14.

Inspection Service Fees.

95-107. Assessment and collection of fees; certificates of safe operation.

Article 14A.

Elevator Safety Act of North Carolina.

95-110.5. Powers and duties of Commissioner.

Article 14B.

Amusement Device Safety Act of North Carolina.

95-111.12. Liability insurance.

Article 16.

Occupational Safety and Health Act of North Carolina.

95-126. Short title and legislative purpose.

Sec.
95-131. Development and promulgation of standards; adoption of federal standards and regulations.
95-132. Variances.
95-136.1. Special emphasis inspection program.
95-149. Authority to enter into contracts with other State agencies and subdivisions of government.

Article 19.

Migrant Housing Act of North Carolina.

95-225. Adoption of standards and interpretations.
95-227. Enforcement.
95-229.1 through 95-229.4. [Reserved.]

Article 19A.

Overhead High-Voltage Line Safety Act.

95-229.5. Purpose; scope.
95-229.6. Definitions.
95-229.7. Prohibited activities.
95-229.8. Warning signs.
95-229.9. Notification.
95-229.10. Precautionary safety arrangements.
95-229.11. Exemptions.
95-229.12. Application.
95-229.13. Severability.

Article 20.

Controlled Substance Examination Regulation.

95-232. Procedural requirements for the administration of controlled substance examinations.

Article 21.

Retaliatory Employment Discrimination.

95-241. Discrimination prohibited.

Article 22.

Safety and Health Programs and Committees.

95-255.1. Technical assistance.

ARTICLE 1.

Department of Labor.

§ 95-4. Authority, powers and duties of Commissioner.

CASE NOTES

A violation of the duties of the Commissioner of Labor to enforce inspection laws, to inspect the workplaces of North Carolina, and to prosecute violations can give rise to an action for negligence. Stone v. North Carolina Dep't of Labor, 125 N.C. App. 288, 480 S.E.2d 410 (1997).

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

CASE NOTES

Businesses covered by the federal Fair Labor Standards `Act are exempt

Where employer-employee relationship at issue was covered by the Fair Labor Standards Act, it was exempt from the provisions of the North Carolina Wage and Hour Act. Spencer v. Hyde County, E.D.N.C. 959 F.Supp. 721 (1997).

Claim for Unpaid Bonus. — Plaintiff's state claims presented complex and unsettled issues of North Carolina law which would be more appropriately resolved by a North Carolina court including the proper definition of "handicapped person" under § 143-422.2, part of the North Carolina Equal Employment Practices Act; and the proper analysis of this act, with its accompanying administrative regulations in the North Carolina Administrative Code, in the context of the plaintiff's claim for an unpaid bonus. McCullough v. Branch Banking & Trust Co., 844 F. Supp. 258 (E.D.N.C. 1993), aff'd, 35 F.3d 127 (4th Cir. 1994), cert. denied, — U.S. —, 115 S. Ct. 1101, 130 L. Ed. 2d 1069 (1995).

Liquidated Damages. — The employer bears the burden of demonstrating that liquidated damages should not be imposed; however, even if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Wage and Hour Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.2. Definitions.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Cited in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least the minimum wage set forth in paragraph 1 of section 6(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1), as that wage may change from time to time, except as otherwise provided in this section.

(b) In order to prevent curtailment of opportunities for employment, the wage rate for full-time students, learners, apprentices, and messengers, as defined under the Fair Labor Standards Act, shall be ninety percent (90%) of the rate in effect under subsection (a) above, rounded to the lowest nickel.

(c) The Commissioner, in order to prevent curtailment of opportunities for employment, may, by regulation, establish a wage rate less than the wage rate in effect under section (a) which may apply to persons whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, as such persons are defined under the Fair Labor Standards Act.

(d) The Commissioner, in order to prevent curtailment of opportunities for employment of the economically disadvantaged and the unemployed, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to all persons (i) who have been unemployed for at least 15 weeks and who are economically disadvantaged, or (ii) who are, or whose families are, receiving Work First Family Assistance or who are receiving supplemental security benefits under Title XVI of the Social Security Act.

Pursuant to regulations issued by the Commissioner, certificates establishing eligibility for such subminimum wage shall be issued by the Employment Security Commission.

The regulation issued by the Commissioner shall not permit employment at the subminimum rate for a period in excess of 52 weeks.

(e) The Commissioner, in order to prevent curtailment of opportunities for employment, and to not adversely affect the viability of seasonal establishments, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to any employee employed by an establishment which is a seasonal amusement or recreational establishment, or a seasonal food service establishment.

(f) Tips earned by a tipped employee may be counted as wages only up to the amount permitted in section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m), if the tipped employee is notified in advance, is permitted to retain all tips and the employer maintains accurate and complete records of tips received by each employee as such tips are certified by the employee monthly or for each pay period. Even if the employee refuses to certify tips accurately, tips may still be counted as wages when the employer complies with the other requirements of this section and can demonstrate by monitoring tips that the employee regularly receives tips in the amount for which the credit is taken. Tip pooling shall also be permissible among employees who customarily and regularly receive tips; however, no employee's tips may be reduced by more than fifteen percent (15%) under a tip pooling arrangement.

(g) In order to prevent curtailment of opportunities for employment, an employer may, in lieu of the minimum wage prescribed by this section, pay a training wage to eligible persons in accordance with G.S. 95-25.3A. (1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1; 1981, c. 493, s. 1; c. 663, s. 13; 1983, c. 708, s. 1; 1985, c. 97; 1987, c. 79; 1991, c. 270, ss. 1, 2; c. 330, s. 5; 1997-146, s. 1; 1997-443, s. 12.25.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-146, s. 1, effective August 1, 1997, in subsection (a) substituted "the minimum wage set forth in paragraph 1 of section (6)(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1), as that wage may change from time to time" for "three dollars and eighty cents ($3.80) per hour effective January 1, 1992, and four dollars and twenty five cents ($4.25) per hour effective January 1, 1993"; in subsection (d) substituted "Work First Family Assistance" for "aid to families with dependent children provided under Part A of Title IV of the Social Security Act"; and in subsection (f) substituted "the amount permitted in section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m)" for "fifty percent (50%) of the applicable minimum wage for each hour worked".

Session Laws 1997-443, s. 12.25, effective August 28, 1997, substituted "Work First Family Assistance" for "aid to families with dependent children provided under Part A of Title IV of the Social Security Act" in subsection (d).

§ 95-25.5. Youth employment.

(a) No youth under 18 years of age shall be employed by any employer in any occupation without a youth employment certificate unless specifically exempted. The Commissioner of Labor shall prescribe regulations for youths and employers concerning the issuance, maintenance and revocation of certificates. Certificates will be issued, subject to review by the Department of Labor, by county directors of social services and such of their designees as are approved by the Commissioner; provided, the Commissioner may by regulation require that the Department of Labor issue certificates for occupations with unusual or unique characteristics.

(a1) During the regular school term, no youth under 18 years of age who is enrolled in school in grade 12 or lower may be employed between 11 P.M. and 5 A.M. when there is school for the youth the next day. This restriction does not apply to youths 16 and 17 years of age if the employer receives written approval for the youth to work beyond the stated hours from the youth's parent or guardian and from the youth's principal or the principal's designee.

(b) No youth under 18 years of age may be employed by an employer in any occupation which the United States Department of Labor shall find and by order declare to be hazardous and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing shall find and declare to be detrimental to the health and well-being of youths.

(c) No youth 14 or 15 years of age may be employed by an employer in any occupation except those determined by the United States Department of Labor to be permitted occupations under the Fair Labor Standards Act; provided, such youths may be employed by employers:

(1) No more than three hours on a day when school is in session for the youth;

(2) No more than eight hours on a day when school is not in session for the youth;
(3) Only between 7 A.M. and 7 P.M., except to 9 P.M. during the summer (when school is not in session);
(4) No more than 40 hours in any one week when school is not in session for the youth;
(5) No more than 18 hours in any one week when school is in session for the youth; and
(6) Only outside school hours.

Notwithstanding the above, enrollees in high school apprenticeships or in work experience and career exploration programs as defined under the Fair Labor Standards Act may work up to 23 hours in any one week when school is in session, any portion of which may be during school hours.

(d) No youth 13 years of age or less may be employed by an employer, except youths 12 and 13 years of age may be employed outside school hours in the distribution of newspapers to the consumer but not more than three hours per day. An employment certificate shall not be required for any youth under 18 years of age engaged in the distribution of newspapers to the consumer outside of school hours.

(e) No youth under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

(f) For any youth 13 years of age or older, the Commissioner may waive any provision of this section and authorize the issuance of an employment certificate when:

(1) He receives a letter from a social worker, court, probation officer, county department of social services, a letter from the North Carolina Alcohol Beverage Control Commission or school official stating those factors which create a hardship situation and how the best interest of the youth is served by allowing a waiver; and
(2) He determines that the health or safety of the youth would not be adversely affected; and
(3) The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment.

(g) Youths employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions are exempt from all provisions of this section except the certificate requirements of subsection (a).

(h) Youths employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties and special effects are exempt from all provisions of this section except the certificate requirements of subsection (a). Positions such as office workers, ticket takers, ushers and parking lot attendants have no exemption and are subject to all provisions of this section.

(i) Youths under 18 years of age employed by their parents are exempt from all provisions of this section, except for all of the following:

(1) The certificate requirements of subsection (a) of this section.
(2) The prohibition from hazardous or detrimental occupations of subsection (b) of this section.
(3) The prohibitions of subsection (j)(2) of this section if the youths only work at the establishment when another em-

ployee at least 21 years of age is in charge of and present at the licensed premises.

(j) No person who holds any ABC permit issued pursuant to the provisions of Chapter 18B of the General Statutes for the on-premises sale or consumption of alcoholic beverages, including any mixed beverages, shall employ a youth:

(1) Under 16 years of age on the premises for any purpose;
(2) Under 18 years of age to prepare, serve, dispense or sell any alcoholic beverages, including mixed beverages.

(k) Persons and establishments required to comply with or subject to regulation of child labor under the Fair Labor Standards Act are exempt from all provisions of this section, except the certificate requirements of subsection (a), the provisions of subsection (a1), the prohibition from occupations found and declared to be detrimental by the Commissioner of Labor pursuant to subsection (b), and the prohibitions of subsection (j). In addition, employment certificates will not be issued if such person's employment will be in violation of the applicable child labor provisions of the Fair Labor Standards Act. Such employers may also be assessed civil penalties pursuant to G.S. 95-25.23 for each violation of the provisions of this section or any regulation issued hereunder from which there is no exemption.

(*l*) Notwithstanding any other provision of this section, any youth who holds a North Carolina driver's license valid for the type of driving involved may be assigned as part of his employment to drive an automobile or truck not exceeding 6,000 pounds gross vehicle weight within a 25-mile radius of the principal place of employment, provided that the youth has completed a State-approved driver-education course, and provided that the assignment does not involve the towing of vehicles. "Gross vehicle weight" includes the truck chassis with lubricants, water and full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1; 1981, c. 412, ss. 3, 4; c. 489, ss. 1-7; c. 747, s. 66; 1985, c. 97, s. 1; 1987, c. 154; 1991, c. 492, s. 2; 1991 (Reg. Sess., 1992), c. 991, s. 1; 1993, c. 239, s. 1; 1995, c. 214, s. 1.)

§ 95-25.7. Payment to separated employees.

CASE NOTES

Quoted in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.9. Certain claims not to be deducted immediately.

CASE NOTES

Stated in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 95-25.11. Employers' remedies preserved.

CASE NOTES

Stated in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 95-25.12. Vacation pay.

CASE NOTES

Quoted in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.5 (Youth Employment), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act:

a. Except as otherwise specifically provided in G.S. 95-25.5;

b. Notwithstanding the above, any employee other than a learner, apprentice, student, or handicapped worker as defined in the Fair Labor Standards Act who is not otherwise exempt under the other provisions of this section, and for whom the applicable minimum wage under the Fair Labor Standards Act is less than the minimum wage provided in G.S. 95-25.3, is not exempt from the provisions of G.S. 95-25.3 or G.S. 95-25.4;

c. Notwithstanding the above, any employer or employee exempt from the minimum wage, overtime, or child labor requirements of the Fair Labor Standards Act for whom there is no comparable exemption under this Article shall not be exempt under this subsection except that where an exemption in the Fair Labor Standards Act provides a method of computing overtime which is an alternative to the method required in 29 U.S.C.S. § 207(a), the employer or employee subject to that alternate method shall be exempt from the provisions of G.S. 95-25.4(a); provided that, persons not employed at an enterprise described in subdivision (1) of this subsection shall also be subject to the same alternative methods of overtime calculation in the circumstances described in the Fair Labor Standards Act exemptions providing those alternative methods;

(2) Any person employed in agriculture, as defined under the Fair Labor Standards Act;

(3) Any person employed as a domestic, including baby sitters and companions, as defined under the Fair Labor Standards Act;

(4) Any person employed as a page in the North Carolina General Assembly or in the Governor's Office;
(5) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;
(6) Persons confined in and working for any penal, correctional or mental institution of the State or local government;
(7) Any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;
(8) Any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects, except as otherwise specifically provided in G.S. 95-25.5; but this exemption does not include such positions as office workers, ticket takers, ushers and parking lot attendants.

(b) The provisions of G.S. 95-25.3 (Minimum Wage) and G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:
(1) Any employee of a boys' or girls' summer camp or of a seasonal religious or nonprofit educational conference center;
(2) Any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act;
(3) The spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina;
(4) Any person employed in a bona fide executive, administrative, professional or outside sales capacity, as defined under the Fair Labor Standards Act;
(5) Repealed by Session Laws 1989, c. 687, s. 2.
(6) Any person while participating in a ridesharing arrangement as defined in G.S. 136-44.21;
(7) Any person who is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, as defined in the Fair Labor Standards Act.

(c) The provisions of G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to this exemption, do not apply to:
(1) Drivers, drivers' helpers, loaders and mechanics, as defined under the Fair Labor Standards Act;
(2) Taxicab drivers;
(3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;
(4) Salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;
(5) Salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act;
(6) Live-in child care workers or other live-in employees in homes for dependent children;
(7) Radio and television announcers, news editors, and chief engineers, as defined under the Fair Labor Standards Act.

(d) The provisions of this Article do not apply to the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, except for the following provisions, which do apply:

(1) The minimum wage provisions of G.S. 95-25.3;
(2) The definition provisions of G.S. 95-25.2 necessary to interpret the applicable provisions;
(3) The exemptions of subsections (a) and (b) of this section;
(4) The complainant protection provisions of G.S. 95-25.20.

(e) Employment in a seasonal recreation program by the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, is exempt from all provisions of this Article, including G.S. 95-25.3 (Minimum Wage). (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1; 1981, c. 493, s. 2; c. 606, s. 2; c. 663, s. 7; 1983, c. 708, s. 2; 1989, c. 687, s. 2; 1991, c. 330, s. 3; 1993, c. 214, s. 2; 1995, c. 509, s. 47; 1997-146, s. 2.)

Effect of Amendments. — The 1997 amendment, effective August 1, 1997, added subdivision (b)(7) and made a related change.

CASE NOTES

Construction with Federal Law. — Where employer-employee relationship at issue was covered by the Fair Labor Standards Act, it was exempt from the provisions of the North Carolina Wage and Hour Act. Spencer v. Hyde County, E.D.N.C. 959 F.Supp. 721 (1997).

§ 95-25.21. Illegal acts.

Editor's Note. — Session Laws 1993, c. 539, s. 661, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-25.22. Recovery of unpaid wages.

CASE NOTES

Accrual of Cause of Action. — As defendant's policy did not require it to pay cash for any unused vacation days until the employment was terminated, no individual plaintiff had a cause of action until the next pay day after termination; thus the trial court correctly found that only those plaintiffs whose pay date next following termination preceded two years prior to the filing of the action were barred by this section. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

Liquidated Damages Mandated. — Where defendant pointed to no evidence to show that the failure to pay plaintiffs for their vacation days was done in good faith or in the belief that it was not a violation of the Wage and Hour Act, this section mandated that the trial court award liquidated damages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

While this section states that interest may be recovered on the unpaid wages, it does not provide that interest is payable on liquidated damages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

ARTICLE 3.

Various Regulations.

§ 95-28: Repealed by Session Laws 1997-443, s. 19.14, effective July 1, 1997.

§ 95-28.1A. Discrimination against persons based on genetic testing or genetic information prohibited.

(a) No person, firm, corporation, unincorporated association, State agency, unit of local government, or any public or private entity shall deny or refuse employment to any person or discharge any person from employment on account of the person's having requested genetic testing or counseling services, or on the basis of genetic information obtained concerning the person or a member of the person's family. This section shall not be construed to prevent the person from being discharged for cause.

(b) As used in this section, the term "genetic test" means a test for determining the presence or absence of genetic characteristics in an individual or a member of the individual's family in order to diagnose a genetic condition or characteristic or ascertain susceptibility to a genetic condition. The term "genetic characteristic" means any scientifically or medically identifiable genes or chromosomes, or alterations or products thereof, which are known individually or in combination with other characteristics to be a cause of a disease or disorder, or determined to be associated with a statistically increased risk of development of a disease or disorder, and which are asymptomatic of any disease or disorder. The term "genetic information" means information about genes, gene products, or inherited characteristics that may derive from an individual or a family member. (1997-350, s. 2.)

Editor's Note. — Session Laws 1997-350, s. 5, made this section effective August 1, 1997.

Session Laws 1997-350, s. 4, provides: "Nothing in this act applies to specified accident, specified disease, hospital indemnity, disability, or long-term care health insurance policies."

§ 95-28.2. Discrimination against persons for lawful use of lawful products during nonworking hours prohibited.

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

§ 95-28.3. Leave for parent involvement in schools.

(a) It is the belief of the General Assembly that parent involvement is an essential component of school success and positive student outcomes. Therefore, employers shall grant four hours per year leave to any employee who is a parent, guardian, or person standing in loco parentis of a school-aged child so that the employee may attend or otherwise be involved at that child's school. However, any leave under this section is subject to the following conditions:

(1) The leave shall be at a mutually agreed upon time between the employer and the employee.
(2) The employer may require an employee to provide the employer with a written request for the leave at least 48 hours before the time desired for the leave.
(3) The employer may require that the employee furnish written verification from the child's school that the employee attended or was otherwise involved at that school during the time of the leave.

For the purpose of this section, "school" means any (i) public school, (ii) private church school, church of religious charter, or nonpublic school described in Parts 1 and 2 of Article 39 of Chapter 115C of the General Statutes that regularly provides a course of grade school instruction, (iii) preschool, and (iv) child care facility as defined in G.S. 110-86(3).

(b) Employers shall not discharge, demote, or otherwise take an adverse employment action against an employee who requests or takes leave under this section. Nothing in this section shall require an employer to pay an employee for leave taken under this section.

(c) An employee who is demoted or discharged or who has had an adverse employment action taken against him or her in violation of this section may bring a civil action within one year from the date of the alleged violation against the employer who violates this section and obtain either of the following:

(1) Any wages or benefits lost as a result of the violation; or
(2) An order of reinstatement without loss of position, seniority, wages, or benefits.

The burden of proof shall be upon the employee. (1993, c. 509, s. 1; 1997-506, s. 34.)

Effect of Amendments. — The 1997 amendment, effective September 16, 1997, substituted "child care facility" for "child day care facility" in the last sentence of subsection (a).

Article 4.

Conciliation Service and Mediation of Labor Disputes.

§ 95-36. Powers and duties of Commissioner and conciliator.

Legal Periodicals. —

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

ARTICLE 5A.

Regulation of Private Personnel Services.

§ 95-47.4. Contracts; contents; approval; tying contracts forbidden.

(a) A contract between a private personnel service and an applicant shall be in writing, labeled as a contract, physically separate from any application and made in duplicate. One copy shall be given to the applicant and the other shall be kept by the private personnel service as required by G.S. 95-47.5(2).

(b) Any contract that obligates an applicant to pay a fee to the private personnel service shall include:

(1) The name, address and telephone number of the private personnel service;
(2) The name of the applicant;
(3) The date the contract was signed;
(4) A clear schedule of the fees to be charged to the applicant at various salary levels;
(5) A clear explanation of when the applicant becomes obligated to pay a fee;
(6) A clear refund policy (or no refund policy) that conforms to the requirements of G.S. 95-47.4(f) and (g);
(7) If the applicant is obligated whether or not the applicant accepts employment, a clear explanation of the services provided and a statement that the private personnel service does not guarantee that the applicant will obtain employment as a result of its services;
(8) A statement, in a type size no smaller than nine point, directly above the place for the applicant's signature, that reads as follows: "I have read and received a copy of this CONTRACT, which I understand makes me legally obligated to pay a fee under conditions outlined above." In the preceding statement the word "CONTRACT" and no others shall be in all capitals; and
(9) A statement that the private personnel service is licensed and regulated by the Commissioner and the address at which a copy of laws and regulations governing private personnel services may be obtained.

(c) A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the private personnel service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants.

(d) A private personnel service shall not require an applicant to sign a contract with the private personnel service before the applicant has had an opportunity to read the contract and discuss the contract with an employee of the personnel agency who regularly arranges contacts and assists in negotiations between employers and applicants. A private personnel service shall not coerce an applicant into signing a contract by applying or using duress, undue influence, fraud or misrepresentation sufficient to invalidate the contract under North Carolina law.

(e) Any contract that obligates an applicant to pay a fee to the private personnel service when the applicant accepts employment shall be physically separate from any contract that obligates an applicant to pay a fee whether or not the applicant accepts employment. A private personnel service shall not require an applicant to sign one contract as a prerequisite to signing another contract or to pay a fee as a prerequisite to signing a contract. Express violations of this subsection are the following:

(1) Refusal to allow an applicant to contract for counseling, job information or resume writing services, if the applicant does not agree to pay an additional fee upon acceptance of employment; and

(2) Refusal to allow an applicant to contract for services which obligate the applicant only upon acceptance of employment, if the applicant does not agree to pay a registration fee or to contract for counseling, resume writing or other services.

(f) If a private personnel service has a refund policy, included on each contract that obligates an applicant upon acceptance of employment will be a statement defining:

(1) The length of the period of time covered by the refund policy;

(2) The exact manner of computing the refund so that the amount of refund due the applicant will be clear;

(3) The conditions under which a refund becomes due to the applicant. The conditions of the refund, if other than unconditional policy is used, shall contain a definition of the reasons for which a refund will not be made. A refund will not be denied except for a reason so stated in the definition of the contract;

(4) A personnel service shall abide by the refund policy stated on its contract by promptly paying to applicants any refund due under the terms of the contract.

(g) If a private personnel service has no refund policy, the private personnel service shall include on each contract that obligates an applicant upon acceptance of employment, in a type size no smaller than nine point, a statement that reads as follows:

"................. (name of private personnel service) will make NO REFUND under any circumstances of fees paid by the applicant." In the preceding statement the words NO REFUND and no others shall be in all capitals.

(h) If a private personnel service places an applicant in a position of employment, the compensation of which is based, in whole or in part, on commission, the private personnel service shall:

(1) Have a written job order from the employer that includes the anticipated earnings upon which the private personnel service may base its fee, or

(2) In lieu of the written job order required by subdivision (1) of this subsection, have a policy of providing the same fee reimbursement as may be available to applicants from employers under the provisions of G.S. 95-47.3A.

In no case may the applicant collect the same reimbursement from both the employer and the private personnel service. When the private personnel service elects to obtain the written job order from the employer and not have its own reimbursement policy as described in subdivision (2) of this subsection, the private personnel service shall explain to the applicant and the employer how the fee for the placement is calculated, and shall inform in writing both the applicant and the employer of the provisions of G.S. 95-47.3A governing fee refunds from employers. (1979, c. 780, s. 1; 1991 (Reg. Sess., 1992), c. 970, s. 2; 1993, c. 202, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, which amended this section, in s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

§ 95-47.7. Private Personnel Service Advisory Council.

(a) There is hereby established the North Carolina Private Personnel Service Advisory Council. The Council shall be composed of 12 members appointed by the Commissioner. Each member of the Council shall be domiciled in this State for at least three years immediately preceding his appointment and be of good moral character. At least five members shall have occupied for at least three years immediately preceding their appointment, and shall occupy at the time of appointment, executive or managerial positions in the private personnel service industry in North Carolina; and at least three shall have occupied, for at least three years immediately preceding their appointment, executive or managerial positions as personnel officers in companies which regularly utilize the services of private personnel services in obtaining employees. Members of the Council shall serve without salary, but shall be paid per diem, subsistence, and travel allowance in accordance with Chapter 138 of the General Statutes.

(b) Each member of the Council shall hold office until the appointment and qualification of his successor. The terms of the initial members of the Council shall expire as follows: four members, July 1, 1980; four members, July 1, 1981; four members, July 1, 1982. Subsequent appointments shall be made for terms of three years. Vacancies occurring in the membership of the Council for any cause shall be filled by appointment for the balance of the unexpired term. The Commissioner may remove any member of the Council for misconduct, incompetency, neglect of duty, or other good cause.

(c) The Council shall meet at least once in each calendar quarter of each year. All meetings of the Council shall be open and public and all records of the Council shall be open to inspection, except as otherwise prescribed by law. Seven members shall constitute a quorum for the transaction of business. The Council shall elect from its members, each for term of one year, a chairman and vice-chairman, and may appoint such committees as it deems necessary to carry out its duties. The Commissioner or his designee shall serve ex officio as the secretary of the Council, but shall not be a member of the Council. (1979, c. 780, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, which amended this section, in s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

§ 95-47.9. Enforcement of Article; rules; hearing; penalty; criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 663, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 6.

Separate Toilets for Sexes.

§§ 95-48 through 95-53: Repealed by Session Laws 1993, c. 204, s. 1, effective June 23, 1993.

Editor's Note. — Session Laws 1993, c. 204, s. 1 repealed this Article, effective June 23, 1993. Repealed G.S. 95-50 was also amended by Session Laws 1993, c. 539, s. 664, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. Because of the repeal of this section, the amendment is not set out.

ARTICLE 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.18. Inspection certificates required; misrepresentation as inspector.

Editor's Note. — Session Laws 1993, c. 539, s. 665, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 9.

Earnings of Employees in Interstate Commerce.

§ 95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.

Editor's Note. — Session Laws 1993, c. 539, s. 666, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Legal Periodicals. — For survey of developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

§ 95-99. Penalty for violation of Article.

Editor's Note. — Session Laws 1993, c. 539, s. 667, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 13.

Payments to or for Benefit of Labor Organizations.

§ 95-104. Penalty.

Editor's Note. — Session Laws 1993, c. 539, s. 668, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 14.

Inspection Service Fees.

§ 95-107. Assessment and collection of fees; certificates of safe operation.

The assessment of the fees pursuant to this Article shall be made against the owner or operator of such equipment and may be collected at the time of inspection. If the fees are not collected at the time of inspection, the Department must bill the owner or operator of the equipment for the amount of the fee assessed under this Article for the inspection of the equipment and the amount assessed is payable by the owner or operator of the equipment upon receipt of the bill. Certificates of safe operation may be withheld by the Department of Labor until such time as the assessed fees are collected. (1975, c. 777, s. 3; 1995, c. 217, s. 1.)

ARTICLE 14A.

Elevator Safety Act of North Carolina.

§ 95-110.5. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

(1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of lifting devices and equipment;

(2) To supervise the Director of the Elevator and Amusement Device Division;

(3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices and equipment subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering practice as evidenced generally by the most recent editions of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks, the National Electrical Code, the American National Standard Safety Requirements for Personnel Hoists, the American National Standard Safety Code for Manlifts, the American National Standard Safety Standard for Conveyors and Related Equipment and similar codes promulgated by agencies engaged in research concerning strength of material, safe design, and other factors bearing upon the safe operation of the devices and equipment subject to the provisions of this Article. The rules and regulations may apply different standards to devices and equipment subject to this Article depending upon their date of installation. The rules and regulations for special equipment shall not adopt specifically any portion of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks to inclined and vertical reciprocating conveyors;

(4) To enforce rules and regulations adopted under authority of this Article;

(5) To inspect and have tested for acceptance all new, altered or relocated devices or equipment subject to the provisions of this Article;

(6) To make maintenance and periodic inspections and tests of all devices and equipment subject to the provisions of this Article as often as every six months;

(7) To issue certificates of operation which certify for use such devices and equipment as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;

(8) To have free access, with or without notice, to the devices and equipment subject to the provisions of this Article,

during reasonable hours, for purposes of inspection or testing;

(9) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;

(10) To investigate accidents involving the devices and equipment subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;

(11) To institute proceedings in the civil or criminal courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;

(12) To issue a limited certificate of operation for any device or equipment subject to the provisions of this Article to allow the temporary or restricted use thereof;

(13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;

(14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(15) To require that a construction permit must be obtained from the Commissioner before any device or equipment subject to the provisions of this Article is installed, altered or moved from one place to another and to require that the Commissioner must be supplied with whatever plans, diagrams or other data he deems necessary to determine whether or not the proposed construction is in compliance with the provisions of this Article and the rules and regulations promulgated thereunder;

(16) To prohibit the use of any device or equipment subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device or equipment shall be made operational only upon the Commissioner's determination that such device or equipment has been made safe;

(17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer;

(18) To require that any device or equipment subject to the provisions of this Article which has been out-of-service and not continuously maintained for one or more years shall not be returned to service without first complying with all rules and regulations governing existing installations; and

(19) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner. (1985 (Reg. Sess., 1986), c. 990, s. 1; 1995, c. 217, s. 2.)

§ 95-110.11. Violations; criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 669, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 14B.

Amusement Device Safety Act of North Carolina.

§ 95-111.1. Short title and legislative purpose.

CASE NOTES

Quoted in Hunt ex rel. Hasty v. North Carolina Dep't of Labor, 125 N.C. App. 293, 480 S.E.2d 413 (1997).

§ 95-111.4. Powers and duties of Commissioner.

CASE NOTES

Inspection of Amusement Devices. — North Carolina Administration Code, tit. 13, r. 15.0405, imposes a duty on defendant to inspect amusement devices to ensure they comply with its rules, and a breach of this duty may give rise to an action for negligence. Hunt ex rel. Hasty v. North Carolina Dep't of Labor, 125 N.C. App. 293, 480 S.E.2d 413 (1997).

§ 95-111.12. Liability insurance.

(a) No owner shall operate a device subject to the provisions of this Article, unless at the time, there is in existence a contract of insurance providing coverage of not less than one million dollars ($1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of such device or there is in existence a contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the amusement devices if the annual gross volume of the devices does not exceed two hundred seventy-five thousand dollars ($275,000); provided waterslides shall not be required to be insured as herein provided for an amount in excess of one hundred thousand dollars ($100,000) per occurrence. The insurance contract to be provided must be by any insurer or surety that is acceptable to the North Carolina Insurance Commissioner and authorized to transact business in this State; provided, however, that insurance for waterslides may be purchased under Article 21 of Chapter 58 of the General Statutes or under G.S. 58-28-5(b).

(b) No certificate of operation shall be issued by the Commissioner until such time as the owner or his authorized agent provides proof of the required contract of insurance.

(c) The Commissioner shall have the right to request from the owner of a device regulated by this Article, or his authorized agent, proof of the required contract of insurance, and upon failure of the owner or his authorized agent to provide such proof, the Commissioner shall have the right to prevent the commencement of or to stop the operation of the device until such time as proof is provided.

(d) Operators of waterslides, as defined in G.S. 95-111.3(h), shall notify the Commissioner of all incidences of personal injury involving the waterslides, as required by G.S. 95-111.10(a). (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 635, s. 1; c. 864, ss. 90(b), 91(a); 1989, c. 232; 1989 (Reg. Sess., 1990), c. 914; 1995, c. 517, s. 34.)

Editor's Note. —

Session Laws 1995, c. 517, s. 41, contains a severability clause.

Session Laws 1995, c. 517, s. 42, provides that subsection (a) as amended by s. 34 of that act expires December 31, 1997.

Article 15.

Passenger Tramway Safety.

§ 95-124. Suspension of registration.

Editor's Note. — Session Laws 1993, c. 539, s. 670, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

(a) This Article shall be known as the "Occupational Safety and Health Act of North Carolina" and also may be referred to by abbreviations as "OSHANC."

(b) Legislative findings and purpose:

(1) The General Assembly finds that the burden of employers and employees of this State resulting from personal injuries and illnesses arising out of work situations is substantial; that the prevention of these injuries and illnesses is an important objective of the government of this State; that the greatest hope of attaining this objective lies in programs of research, education and enforcement, and in the earnest cooperation of the federal and State governments, employers and employees.

(2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources:

a. By encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at the place of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

b. By providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

c. By authorizing the Commissioner to develop occupational safety and health standards applicable to business giving consideration to the needs of employers and employees and to adopt standards promulgated from time to time by the Secretary of Labor under the Occupational Safety and Health Act of 1970, and by creating a safety and health review board for carrying out adjudicatory functions under this Article;

d. By building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

e. By providing occupational health criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

f. By providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

g. By providing an effective enforcement program which shall include a prohibition against giving advance notice of an inspection and sanctions for any individual violating this prohibition;

h. By providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problem;

i. By encouraging joint employer-employee efforts to reduce injuries and diseases arising out of employment;

j. By providing for research in the field of occupational safety and health, by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

k. By exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

l. By authorizing the Commissioner to enter into contracts with the Department of Health and Human Services, or any other State or local units, to the end the Commissioner and the Department of Health and Human Services and other State or local units may fully cooperate and carry out the ends and purposes of this Article.

m. The General Assembly of North Carolina appoints and elects the North Carolina Department of Labor as the designated agency to administer the Occupational Safety and Health Act of North Carolina. (1973, c. 295, s. 1; c. 476, s. 128; 1989, c. 727, s. 219(13); 1997-443, s. 11A.33.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "ensure" for "assure" in the preliminary language of subdivision (b)(2), and "Department of Health and Human Services" for "Department of Environment, Health, and Natural Resources" twice in subdivision (b)(2)*l*.

§ 95-127. Definitions.

CASE NOTES

To establish a serious violation, the Commissioner of Labor must show by substantial evidence that the violation creates (1) the possibility of an accident, and (2) the substantially probable result of which is death or serious physical injury. Yates Constr. Co. v. Commissioner of Labor, — N.C. App. —, 484 S.E.2d 430 (1997).

Quoted in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

Cited in Brooks v. Ansco & Assocs., 114 N.C. App. 711, 443 S.E.2d 89 (1994); Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 95-128. Coverage.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Cited in Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 95-130. Rights and duties of employees.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

(a) All occupational safety and health standards promulgated under the federal act by the Secretary, and any modifications, revision, amendments or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health and adopted by the Secretary, shall be adopted as the rules of the Commissioner of this State unless the Commissioner decides to adopt an alternative State rule as effective as the federal requirement and providing safe and healthful employment in places of employment as required by the federal act and standards and regulations heretofore referred to and as provided by the Occupational Safety and Health Act of 1970. Chapter 150B of the General Statutes governs the adoption of rules by the Commissioner.

(b), (c) Repealed by Session Laws 1991, c. 418, s. 8, effective October 1, 1991.

(d) Rules adopted under this section shall provide insofar as possible the highest degree of safety and health protection for employees; other considerations shall be the latest available scientific data in the field, the feasibility of the standard, and experience gained under this and other health and safety laws. Whenever practical the standards established in a rule shall be expressed in terms of objective criteria and of the performance desired. In establishing standards dealing with toxic materials or harmful physical agents, the Commissioner, after consultation and recommendations of the Department of Health and Human Services, shall set a standard which most adequately assures, to the extent possible, on the basis of the most available evidence that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

(e) The Commissioner may not adopt State standards, for products distributed or used in interstate commerce, which are different from federal standards for such products unless the adoption of such State standard, or standards, is required by compelling local conditions and does not unduly burden interstate commerce.

(f) Repealed by Session Laws 1991, c. 418, s. 8, effective October 1, 1991.

(g) Any rule, regulation, scope, or standard for agricultural employers adopted or promulgated prior to July 12, 1988, that differs from the federal rule, regulation, scope, or standard is repealed effective September 1, 1989, unless readopted pursuant to Chapter 150B of the General Statutes. (1973, c. 295, s. 6; c. 476, s. 128; 1975, 2nd Sess., c. 983, s. 81; 1987, c. 285, s. 17; 1987 (Reg. Sess., 1988), c. 1111, ss. 7, 8; 1989, c. 727, s. 219(14); 1991, c. 418, s. 8; 1997-443, s. 11A.34.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Department of Health and Human Services" for "Department of Environment, Health, and Natural Resources" in the last sentence of subsection (d).

CASE NOTES

Cited in Sloan v. Miller Bldg. Corp., 119 N.C. App. 162, 458 S.E.2d 30 (1995).

§ 95-132. Variances.

(a) Temporary Variances. —

(1) The Commissioner may upon written application by an employer issue an order granting such employer a temporary variance from standards adopted by this Article or promulgated by the Commissioner under this Article. Any such order shall prescribe the practices, means, methods, operations and processes which the employer must adopt or

use while the variance is in effect and state in detail a program for coming into compliance with the standard.

(2) An application for a temporary variance shall contain all information required as enumerated in 29 C.F.R. 1905.10(b) which is hereby incorporated by reference, as if herein fully set out.

(3) Upon receipt of an application for an order granting a temporary variance, the Commissioner to whom such application is addressed may issue an interim order granting such a temporary variance, for the purpose of permitting time for an orderly consideration of such application. No such interim order may be effective for longer than 180 days.

(4) Such a temporary variance may be granted only after notice to employees and interested parties and opportunity for hearing. The temporary variance may be for a period of no longer than required to achieve compliance or one year, whichever is shorter, and may be renewed only once. Application for renewal of a variance must be filed in accordance with provisions in the initial grant of the temporary variance.

(5) An order granting a temporary variance shall be issued only if the employer establishes

a. (i) That he is unable to comply with the standard by the effective date because of unavailability of professional or technical personnel or materials and equipment required .or necessary construction or alteration of facilities or technology, (ii) that all available steps have been taken to safeguard his employees against the hazards covered by the standard, and (iii) that he has an effective program for coming into compliance with the standard as quickly as practicable, or

b. That he is engaged in an experimental program as described in subsection (c) of this section as hereinafter stated.

(b) Permanent Variances. —

(1) Any affected employer may apply to the Commissioner for a rule or order for a permanent variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Commissioner shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard.

(2) The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question.

(3) Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Commis-

sioner on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(c) Experimental Variances. — The Commissioner is authorized to grant a variance from any standard or portion thereof whenever he determines that such variance is necessary to permit an employer to participate in an experiment approved by him designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers. (1973, c. 295, s. 7; 1997-456, s. 27.)

Editor's Note. — Subdivisions (a)(1) and (b)(1) have been reformatted slightly pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections or parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 95-135. Safety and Health Review Board.

CASE NOTES

Cited in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-136.1. Special emphasis inspection program.

(a) As used in this section, a "special emphasis inspection" is an inspection by the Department's occupational safety and health division that is scheduled because of an employer's high frequency of violations of safety and health laws or because of an employer's high risk or high rate of work-related fatalities or work-related serious injuries or illnesses.

(b) The Department shall develop and implement a special emphasis inspection program that targets for special emphasis inspection employers who:

(1) Have a high rate of serious or willful violations of any standard, rule, order, or other requirement under this Article, or of regulations prescribed pursuant to the Federal Occupational Safety and Health Act of 1970, in a one-year period;

(2) Have a high rate of work-related deaths, or a high rate of work-related serious injuries or illnesses, in a one-year period; or

(3) Are engaged in a type of industry determined by the Department to be at high risk for serious or fatal work-related injuries or illnesses.

(4) Repealed by Session Laws 1997-443, s. 17(b), effective July 1, 1997.

To identify an employer for a special emphasis inspection, the Department shall use the most current data available from its own database and from other sources, including State departments, divisions, boards, commissions, and other State entities. The Department shall ensure that every employer targeted for a special emphasis inspection is inspected at least one time within the two-year period following targeting of the employer by the Department. The Department shall update its special emphasis inspection records at least annually.

(c) The Director shall make information about the special emphasis inspection program available prior to the date of implementation of the program.

(d) The Department shall by March 1, 1995, and annually thereafter, report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the General Assembly on the impact of the special emphasis inspection program on safety and health compliance and enforcement. (1991 (Reg. Sess., 1992), c. 924, s. 1; 1997-443, s. 17(b).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective July 1, 1997, deleted subdivision (b)(4), regarding experience modification ratings, and made a related change.

§ 95-137. Issuance of citations.

CASE NOTES

Violations of Occupational Safety and Health Act. — The General Assembly determined that the State and its agencies can be issued citations for violations of the Occupational Safety and Health Act which are enforceable by proceedings before the Safety and Health Review Board. Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Cited in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-138. Civil penalties.

Editor's Note. — The word "provision" has been substituted for "provisions" in the next-to-last sentence of subsection (a) of this section, to correct a typographical error in the main volume. The word was enacted in its singular form.

§ 95-139. Criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 671, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-141. Judicial review.

CASE NOTES

Cited in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); Yates Constr. Co. v. Commissioner of Labor, — N.C. App. —, 484 S.E.2d 430 (1997).

§ 95-148. Safety and health programs of State agencies and local governments.

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

§ 95-149. Authority to enter into contracts with other State agencies and subdivisions of government.

The Commissioner may enter into contracts with the Department of Health and Human Services or any other State officer or State agency or State instrumentality, or any municipality, county, or other political subdivision of the State, for the enforcement, administration, and any other application of the provisions of this Article. (1973, c. 295, s. 24; 1989, c. 727, s. 24; 1997-443, s. 11A.35.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "may" for "is authorized and empowered to" and "Department of Health and Human Services" for "Department of Environment, Health, and Natural Resources".

Article 18.

Identification of Toxic or Hazardous Substances.

Part 2. Public Safety and Emergency Response Right to Know.

§ 95-194. Emergency information.

Editor's Note. — Session Laws 1993, c. 539, s. 672, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-197. Withholding hazardous substance trade secret information.

Editor's Note. — Session Laws 1993, c. 539, s. 1290, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 19.

Migrant Housing Act of North Carolina.

§ 95-225. Adoption of standards and interpretations.

(a) Unless otherwise provided, all established federal standards are adopted and shall be enforced by the Department of Labor of North Carolina.

(b) The Commissioner shall provide for publication in the North Carolina Register any modification by the federal government of the established federal standards within 30 days of their adoption.

(c) For the protection of the public health, the Commission for Health Services shall adopt and the Department of Environment and Natural Resources shall enforce rules that establish water quality and water sanitation standards for migrant housing under this Article.

(d) The requirements for the collection, treatment, and disposal of sewage, as provided in Article 11 of Chapter 130A, and the rules adopted pursuant to that Article shall apply to migrant housing.

(e) Whenever the outside temperature falls below 50 degrees Fahrenheit and the migrant housing is occupied, heating equipment shall be provided and operable. Regardless of outside temperature, this equipment must be capable of maintaining living areas of 65 degrees Fahrenheit. If housing is to be occupied from May 15 until September 1 only, no heating equipment shall be required at the time of preoccupancy inspection.

(f) All migrant housing shall comply with the standards regarding fire safety for migrant housing as adopted by the Commission for Health Services and in effect on January 1, 1989.

(g) For purposes of this Article, the established federal standard provided in 29 C.F.R. 1910.142(i) does not apply. The following standards shall apply to migrant housing:

(1) Food preparation facilities and eating areas shall be provided and maintained in a clean and sanitary manner;

(2) A kitchen facility shall be provided with an operable stove with at least one burner per five people, and in no event with less than two burners; an operable refrigerator with .75 cubic feet per person minimum; a table; and a sink with running hot and cold water;

(3) Surfaces with which food or drink come in contact shall be easily accessible for cleaning, and shall be nontoxic, resistant to corrosion, nonabsorbent, and free of open crevices;

(4) Acceptable storage facilities shall be provided and shall be kept clean and free of vermin; and

(5) All food service facilities, other than those where migrants procure and prepare food for their own or their family's consumption, shall comply with the standards regarding kitchen and dining room facilities for migrant housing, as adopted by the Commission for Health Services and in effect on January 1, 1989. (1989, c. 91, s. 2; c. 727, s. 220; 1997-443, s. 11A.36.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Department of Environment and Natural Resources" for "Department of Environment, Health, and Natural Resources" in subsection (c).

§ 95-227. Enforcement.

For the purpose of enforcing the standards provided by this Article, the provisions of G.S. 95-129, G.S. 95-130 and G.S. 95-136 through G.S. 95-142 shall apply under this Article in a similar manner as they apply to places of employment under OSHANC; however, G.S. 95-129(4), 95-130(2), and 95-130(6) do not apply to migrant housing. For the purposes of this Article, the term:

(1) "Employer" in G.S. 95-129, G.S. 95-130 and G.S. 95-136 through G.S. 95-142 shall be construed to mean an operator;

(2) "Employee" shall be construed to mean a migrant; and

(3) "Director" shall mean the agent designated by the Commissioner to assist in the administration of this Article.

The Commissioner may establish a new division to enforce this Article. (1989, c. 91, s. 2; 1997-35, s. 1.)

Effect of Amendments. — The 1997 amendment, effective April 23, 1997, in the first paragraph substituted "G.S. 95-129(4), 95-130(2), and 95-130(6)" for "G.S. 95-129(4), 95-130(2) and (6), and 95-137(b)(4)".

§§ 95-229.1 through 95-229.4: Reserved for future codification purposes.

ARTICLE 19A.

Overhead High-Voltage Line Safety Act.

§ 95-229.5. Purpose; scope.

The purpose of this Article is to promote the safety and protection of persons engaged in work in the vicinity of high-voltage overhead lines. This Article defines the conditions under which work may be carried on safely and provides for the precautionary safety arrangements to be taken when any person engages in work in proximity to overhead high-voltage lines. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 587, s. 2, made this article effective October 1, 1996.

§ 95-229.6. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Covered equipment" or "covered items" means any mechanical equipment, hoisting equipment, antenna, or rigging; any part of which is capable of vertical, lateral, or swinging motion that could cause any portion of the equipment or

item to come closer than 10 feet to a high-voltage line during erection, construction, operation, or maintenance; including, but not limited to, equipment such as cranes, derricks, power shovels, backhoes, dump trucks, drilling rigs, pile drivers, excavating equipment, hay-loaders, haystackers, combines, irrigation equipment, portable grain augers or elevators, and mechanical cotton pickers. These terms also include items such as handheld tools, ladders, scaffolds, antennas, and outriggers, houses or other structures in transport, and gutters, siding, and other construction materials, the motion or manipulation of which could cause them to come closer than 10 feet to a high-voltage line.

(2) "High-voltage line" means all aboveground electrical conductors of voltage in excess of 600 volts measured between conductor and ground.

(3) "Person" means natural person, firm, business association, company, partnership, corporation, or other legal entity.

(4) "Person responsible for the work to be done" means the person performing or controlling the job that necessitates the precautionary safety measures required by this Article.

(5) "Warning sign" means a weather-resistant sign of not less than five inches by seven inches with at least two panels: a signal panel and a message panel. The signal panel shall contain the signal word "WARNING" in black lettering and a safety alert symbol consisting of a black triangle with an orange exclamation point, all on an orange background. The message panel shall contain the following words, either in black letters on a white background or white letters on a black background: "UNLAWFUL TO OPERATE THIS EQUIPMENT WITHIN TEN FEET OF OVERHEAD HIGH-VOLTAGE LINES — Contact with power lines can result in death or serious burns." A symbol or pictorial panel may also be added. Such warning sign language, lettering, style, colors, size, and format shall meet the requirements of the American National Standard ANSI Z535.4-1991, Product Safety Signs and Labels, or its successor or such equally effective standard as may be approved for use by the Commissioner of Labor. In the event of a conflict with regard to the appearance or content of the warning sign, the standard approved by the Commissioner of Labor shall take precedence over any description or standard set out in this subdivision. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.7. Prohibited activities.

(a) Unless danger of contact with high-voltage lines has been guarded against as provided by G.S. 95-229.8, 95-229.9, and 95-229.10, the following actions are prohibited:

(1) No person shall, individually or through an agent or employee, perform, or require any other person to perform, any work upon any land, building, highway, or other premises that will cause:

a. Such individual, agent, employee, or other person to be placed within six feet of any overhead high-voltage line; or any part of any tool or material used by the agent, employee, or other person to be brought within six feet of any overhead high-voltage line, or

b. Any part of any covered equipment or covered item used by the individual, agent, employee, or other person to be brought within 10 feet of any high-voltage line.

(2) No person shall, individually or through an agent or employee or as an agent or employee, erect, construct, operate, maintain, transport, or store any covered equipment or covered item within 10 feet of any high-voltage line, or such greater clearance as may be required under the circumstances by OSHA, except as provided herein. This prohibition shall not apply, however, to covered equipment as defined herein when lawfully driven or transported on public streets and highways in compliance with applicable height restrictions. The required clearance from high-voltage lines shall be not less than four feet when:

a. Covered equipment as defined herein is lawfully driven or transported on public streets and highways in compliance with the height restriction applicable thereto,

b. Refuse collection equipment is operating, or

c. Agricultural equipment is operating.

(3) No person shall, individually or through an agent or employee or as an agent or employee, operate or cause to be operated an airplane or helicopter within 20 feet of a high-voltage line, except that no clearance is specified for licensed aerial applicators that may incidentally pass within the 20-foot limitation during normal operation.

(4) No person shall, individually or through an agent or employee or as an agent or employee, store or cause to be stored any materials that are expected to be moved or handled by covered equipment or any covered item within 10 feet of a high-voltage line.

(5) No person shall, individually or through an agent or employee or as an agent or employee, provide or cause to be provided additional clearance by either (i) raising, moving, or displacing any overhead utility lines of any type or nature including high-voltage, low-voltage, telephone, cable television, fire alarm, or other lines or (ii) pulling or pushing any pole, guy, or other structural appurtenance.

(6) No person shall, individually or through an agent or employee or as an agent or employee, excavate or cause to be excavated any portion of any foundations of structures, including guy anchors or other structural appurtenances, which support any overhead utility lines of any type or nature, including high-voltage, low-voltage, telephone, cable television, fire alarm, or other lines.

(b) If the high-voltage line has been insulated or de- energized and grounded, in accordance with G.S. 95-229.10, the required clearances specified in subdivisions (1), (2), and (4) of subsection (a) of this section may be reduced to not less than two feet. Under no circumstances shall the line or its covering be contacted. If the line is temporarily raised or moved to accommodate the expected work, without also being insulated or de-energized and grounded, the required clearances from the line, specified in subsection (a) of this section, shall not be reduced. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.8. Warning signs.

(a) No person shall, individually or through an agent or employee or as an agent or employee, operate any covered equipment in the proximity of a high-voltage line unless warning signs are posted and maintained as follows:

(1) A sign shall be located within the equipment and readily visible and legible to the operator of such equipment when at the controls of such equipment; and

(2) Signs shall be located on the outside of equipment so as to be readily visible and legible at 12 feet to other persons engaged in the work operations.

This subsection shall not apply to handheld tools and handheld equipment which by their size or configuration cannot accommodate the warning signs specified in G.S. 95-229.6(5).

(b) If the Commissioner of Labor determines that a successor, substitute, or additional sign standard may or shall be used in place of the requirements listed in G.S. 95-229.6, a period of not less than 18 months from such determination shall be allowed for any required replacement of signs. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.9. Notification.

(a) When any person desires to carry on any work in closer proximity to any high-voltage line than permitted by G.S. 95-229.7(a), the person responsible for the work to be done shall notify the owner or operator of the high-voltage line prior to the time the work is to be commenced. Such notification shall occur at the earliest practical time; however, such notification shall occur not less than 48 hours, excluding Saturday, Sunday, and legal State and federal holidays, prior to the intended work. In emergency situations, including police, fire, and rescue emergencies, such notification shall occur as soon as possible under the circumstances. In cases where the person or business entity responsible for doing the work is doing so under contract or agreement with a government entity, and the government entity and the owner or operator of the lines have already made satisfactory mutual arrangements, further arrangements for that particular work are not required.

(b) Every notice served by any person on an owner or operator of a high-voltage line shall contain the following information:

(1) The name, address, and telephone number of the individual serving such notice;

(2) The location of the proposed work;

(3) The name, address, and telephone number of the person responsible for the work;

(4) The field telephone number of the site of such work, if one is available;

(5) The type, duration, and extent of the proposed work;

(6) The name of the person for whom the proposed work is being performed;

(7) The time and date of the notice; and

(8) The approximate date and time when the work is to begin.

(c) If the notification required by this Article is made by telephone, a record of the information in subsection (b) of this section shall be maintained by the owner or operator notified and the person giving the notice to document compliance with the requirements of this Article.

(d) Owners or operators of high-voltage lines may form and operate an association providing for mutual receipt of notification of activities close to high-voltage lines in a specified area. In areas where an association is formed, the following shall occur:

(1) Notification to the association shall be effected as set forth in this section.

(2) Owners or operators of high-voltage lines in the area:
  a. May become members of the association;
  b. May participate in and receive the services furnished by the association; and
  c. Shall pay their proportionate share of the cost for the services furnished.

(3) The association whose members or participants have high-voltage lines within a county shall file a list containing the name, address, and telephone number of every member and participating owner or operator of high-voltage lines with the clerk of superior court.

(4) If notification is made by telephone, an adequate record of the information required by subsection (b) of this section shall be maintained by the association to document compliance with the requirements of this Article. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.10. Precautionary safety arrangements.

(a) Installation or performance of precautionary safety arrangements shall be performed by the owner or operator of high-voltage lines only after mutually satisfactory arrangements have been negotiated between the owner or the operator of the lines, or both, and the person responsible for the work to be done. The negotiations shall proceed promptly and in good faith with the goal of accommodating the requested work consistent with the owner's or operator's service needs and the intent to protect the public from the danger of contact with high-voltage lines as far as is reasonable and cost-effective. The person responsible for the work may perform the work only after satisfactory mutual arrangements, including coordination of work and construction schedules, have been made between the owner or operator of the high-voltage lines and the person responsible for the work. The owners or operators of high-voltage lines shall make the final determination as to which arrangements are most feasible and appropriate under the circumstances; provided, however, that the utility may determine that no arrangements can be made that would allow the proposed work to be carried out in a reasonably safe manner or at reasonable cost taking into account the cost to its customers, and the owner or operator of high-voltage lines may refuse to enter into an agreement on that basis.

(b) The precautionary safety measures shall be appropriate, reasonable, and cost-effective for the work of which the owner or operator of high-voltage lines has received notification. During mutual negotiations, the person responsible for the work may change the notification of intended work to include different or limited work so as to reduce the precautionary safety measures required to accommodate such work. The precautionary safety measures shall not violate the requirements of the current edition of the National Electrical Safety Code.

(c) The owner or operator of the high-voltage lines is not required to provide the precautionary safety arrangements until an agreement for payment has been made; except that, if the amount of payment is in dispute, the owner or operator shall commence with providing precautionary safety measures as if agreement had then been reached and the undisputed amount shall be paid according to the agreement reached as to that amount. If agreement for payment of the disputed amount has not been reached within 14 days from completion of precautionary safety measures, the owner or operator and the person or business entity responsible for doing the work may resolve the dispute by arbitration or other legal means.

(d) Unless otherwise agreed, the owner or operator of the high-voltage lines shall initiate the precautionary safety arrangements agreed upon within five working days after the agreement for payment has been reached as required in subsection (c) of this section, but no earlier than the agreed construction date coordinated between the parties. Once initiated, the owner or operator shall complete the work promptly and without interruption, consistent with the owner's or operator's service needs. Should the owner or operator of the high-voltage lines fail to provide the precautionary safety measures agreed upon in a timely manner, the owner or operator of the high-voltage lines shall be liable for costs or loss of production of the person or business entity requesting assistance to work in close proximity to high-voltage lines, except that no such liability shall exist during times of emergency, such as storm repair and the like.

(e) Precautionary safety arrangements may include:

(1) Placement of temporary mechanical barriers separating and preventing contact between material, equipment, other objects, or persons and high-voltage lines;

(2) Temporary de-energization and grounding;

(3) Temporary relocation or raising of the high-voltage lines; or

(4) Other such measures found to be appropriate in the judgment of the owner or operator of the high-voltage lines.

(f) The actual expense incurred by any owner or operator of high-voltage lines in taking precautionary measures as set out in subsections (a) through (e) of this section, including the wages of its workers involved in making safety arrangements, shall be paid by the person responsible for the work to be done, except if:

(1) Any owner or operator of an overhead high-voltage line has located its facilities within a public highway or street right-of-way and the work is performed by or for the Department of Transportation or a city, county, or town, the actual expenses shall be the responsibility of the owner or operator of the overhead high-voltage lines, unless the owner or operator can provide evidence of prior rights or there is a prior written agreement specifying cost responsibility. However, if it is determined by the Department of Transportation or a city, county, or town that the temporary safety arrangements are for the sole convenience of its contractor, the actual expense shall be the responsibility of the contractor;

(2) The owner or operator of the high-voltage lines has not installed the line in conformance with an applicable edition of the National Electrical Safety Code. In that case, the liability of the person responsible for the work shall be limited to the amount required to accommodate the work over and above the amount required to bring the installa-

tion into compliance with the National Electrical Safety Code; or

(3) In the case of property used for residential purposes, such actual expenses shall be limited to those in excess of one thousand dollars ($1,000). (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.11. Exemptions.

(a) This Article shall not apply to the construction, reconstruction, operation, and maintenance of overhead electrical or communication circuits or conductors and their supporting structures and associated equipment of the following systems, provided that such work on any of the following systems is performed by the employees of the owner or operator of the systems or independent contractors engaged on behalf of the owner or operator of the systems to perform the work, and the owner of the system has a valid joint-use contract or agreement with the owner of the high-voltage lines:

(1) Rail transportation systems;
(2) Electrical generating, transmission, or distribution systems;
(3) Communications systems, including cable television; or
(4) Any other publicly or privately owned system, including traffic signals.

(b) This Article also shall not apply to electrical or communications circuits or conductors on the premises of coal or other mines which are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801, et seq.) and regulations adopted pursuant to that Act by the Mine Safety and Health Administration. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.12. Application.

Nothing in this Article shall relieve any person from complying with any safety rule, regulation, or statute not imposed by this Article. A violation of this Article shall not constitute negligence or contributory negligence, nor give rise to any cause of action based upon injury to persons or property. An action may be brought by an owner or operator of a high-voltage line to recover the cost of precautionary safety arrangements or for damage to its facilities. Nothing contained in this Article shall be construed to alter, amend, restrict, or limit the liability of any person for violation of that person's duty under law; nor shall any person be relieved from liability as a result of violations of standards under existing law where such violations of existing standards of care are found to be a cause of damage to property, personal injury, or death. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.13. Severability.

The provisions of this Article are severable. If any part of this Article is declared invalid or unconstitutional, such declaration shall not affect the remainder. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

Article 20.

Controlled Substance Examination Regulation.

§ 95-232. Procedural requirements for the administration of controlled substance examinations.

(a) An examiner who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements set forth in this section.

(b) Collection of samples: the collection of samples for examination or screening shall be performed under reasonable and sanitary conditions. Individual dignity shall be preserved to the extent practicable. Samples shall be collected in a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples.

(c) Approved laboratories: the examiner shall have the option of:

(1) Performing the screening test on-site for prospective employees, provided that samples which demonstrate a positive drug test result are sent to an approved laboratory for confirmation, or

(2) Having an approved laboratory perform both the screening and confirmation tests as provided in this section.

(c1) Confirmation of samples: an approved laboratory shall confirm any sample that produces a positive result by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method.

(d) Retention of samples: a portion of every sample that produces a confirmed positive examination result shall be preserved by the laboratory that conducts the confirmatory examination for a period of at least 90 days from the time the results of the confirmed positive examination are mailed or otherwise delivered to the examiner.

(e) Chain of custody: the examiner or his agent shall establish procedures regarding chain of custody for sample collection and examination to ensure proper record keeping, handling, labeling, and identification of examination samples.

(f) Retesting of positive samples: the examinee shall have the right to retest a confirmed positive sample at the same or another approved laboratory. The examiner, through the approved laboratory, shall make confirmed positive samples available to the affected examinee, or a designated agent, during the time which the sample is required to be retained. The examinee must request release of the sample in writing specifying to which approved laboratory the sample is to be sent. The examinee incurs all reasonable expenses for chain of custody procedures, shipping, and retesting of positive samples related to this request. (1991, c. 687, s. 1; 1993, c. 213, s. 2; 1995, c. 383, s. 1.)

Article 21.

Retaliatory Employment Discrimination.

§ 95-240. Definitions.

Legal Periodicals. —

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-241. Discrimination prohibited.

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
  a. Chapter 97 of the General Statutes.
  b. Article 2A or Article 16 of this Chapter.
  c. Article 2A of Chapter 74 of the General Statutes.
  d. G.S. 95-28.1.
  e. Article 16 of Chapter 127A of the General Statutes.
  f. G.S. 95-28.1A.

(2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.

(3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter or by Article 2A of Chapter 74 of the General Statutes.

(b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee. (1991 (Reg. Sess., 1992), c. 1021, s. 1; 1993, c. 423, s. 1; 1997-153, s. 7; 1997-350, s. 3.)

Editor's Note. — Session Laws 1997-350, s. 4, provides: "Nothing in this act applies to specified accident, specified disease, hospital indemnity, disability, or long-term care health insurance policies."

Effect of Amendments. — Session Laws 1997-153, s. 7, effective December 1, 1997, added subdivision (a)(1)e.

Session Laws 1997-350, s. 3, effective August 1, 1997, inserted "of the General Statutes" in subdivision (a)(1)e., and added subdivision (a)(1)f.

CASE NOTES

Treatment of Similarly Situated Employees. — In an employee discharge case instituted pursuant to former § 97-6.1 (see now this section), evidence of the employer's treatment of similarly situated employees is admissible to show the employer's motive for discharging the employee. Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993).

§ 95-242. Complaint; investigation; conciliation.

CASE NOTES

Time of Determination of Merit of Complaint. — Subsection (a) requires that the Commissioner of Labor make a determination as to the merit of a complaint within 90 days, but fails to provide a result in the event that the Commissioner fails to do so; thus, this statutory time period is of a directory, not jurisdictional nature. Commissioner of Labor v. House of Raeford Farms, Inc., 124 N.C. App. 349, 477 S.E.2d 230 (1996).

ARTICLE 22.

Safety and Health Programs and Committees.

§ 95-250. Definitions.

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

§ 95-255.1. Technical assistance.

Employers notified pursuant to G.S. 95-255(a) shall be offered technical assistance from the Division of Occupational Safety and Health to reduce injuries and illnesses in their workplaces. (1997-443, s. 17(a).)

Editor's Note. — Session Laws 1997-443, s. 35.5, made this section effective July 1, 1997.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Chapter 96.

Editor's Note. — The legislation and annotations affecting Chapter 96 have been included in a recently published replacement chapter.

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Sec.

97-2. Definitions.

97-6.1. [Repealed.]

97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

97-18.1. Termination or suspension of compensation benefits.

97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

97-24. Right to compensation barred after two years; destruction of records.

97-25. Medical treatment and supplies.

97-25.1. Limitation of duration of medical compensation.

97-25.2. Managed care organizations.

97-25.3. Preauthorization.

97-25.4. Utilization guidelines for medical treatment.

97-25.5. Utilization guidelines for vocational and other rehabilitation.

97-26. Fees allowed for medical treatment; malpractice of physician.

97-26.1. Fees for medical records and reports; expert witnesses.

97-31.1. Effective date of legislative changes in benefits.

97-32.1. Trial return to work.

97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

97-40.1. Second Injury Fund.

97-42. Deduction of payments.

97-47.1. Payment without prejudice; limitations period.

97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.

97-61.1. First examination of and report on employee having asbestosis or silicosis.

97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.

97-73. Expenses of making examinations.

97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

97-77.1. (Expires July 1, 2001) Advisory council.

97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed

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forms for approval; direct payment as award.
97-83. Commission is to make award after hearing.
97-83.1. Facilities for hearings; security.
97-86. Award conclusive as to facts; appeal; certified questions of law.
97-88.2. Penalty for fraud.
97-88.3. Penalty for health care providers.
97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.
97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.
97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.
97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; criminal penalties for failure to secure payment of compensation.
Sec.
97-96. [Repealed.]
97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.
97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices.

Article 3.

Security Funds.

97-105 through 97-122. [Repealed.]

Article 4.

North Carolina Self-Insurance Guaranty Association.

97-130. Definitions.
97-131. Creation.
97-133. Powers and duties of the Association.
97-143. Use of deposits made by insolvent member self-insurers.

Article 5.

Individual Employers.

97-165. Definitions.
97-170. License applications; required information.
97-175. License.
97-180. Reporting and records.
97-185. Deposits or surety bond.
97-190. Excess insurance.
97-195. Revocation of license.
97-200. Claims administration.

ARTICLE 1.

Workers' Compensation Act.

§ 97-1. Short title.

Cross References. — As to the inapplicability of this chapter to prisoners working pursuant to § 162-58, see § 162-61.

Editor's Note. — Session Laws 1993, c. 40, s. 1, effective May 5, 1993, provides: "All insurers writing workers' compensation insurance in this State and groups that self-insure their workers' compensation liabilities in this State, shall file with the commissioner by October 1, 1993, their loss control and accident prevention consultation services plans."

Legal Periodicals. —

For note, "Workers' Compensation — Death Knell of a Good Samaritan!," commenting on Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377

S.E.2d 777 (1989), see 12 Campbell L. Rev. 121 (1989).

For note, "The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provisions: Woodson v. Rowland," see 70 N.C.L. Rev. 849 (1992).

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

CASE NOTES

Simultaneous Claims in Workers' Compensation and Civil Intentional Tort. — A plaintiff in North Carolina may now simultaneously pursue a workers' compensation claim and a civil intentional tort claim without being required to elect between them. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

A plaintiff should not be allowed to recover twice for a single injury; once in workers' compensation benefits and a second time in a civil action. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

Where civil action was settled for only $415,000 because plaintiff was already receiving over $700,000 in workers' compensation benefits, the threat of double recovery was negated and the combined amount of $1,197,669.09 was a single recovery. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

Adoption of per diem reimbursement rule exceeded the Commission's statutory authority to review and approve hospital charges for services rendered to patients entitled to care under the Workers' Compensation Act. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Applied in Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 461 S.E.2d 782 (1995).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994); Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995).

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services, unless 10 or more full-time nonseasonal agricultural workers are regularly em-

ployed by the employer and an individual sawmill and logging operator with less than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(2) Employee. — The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, including such as are elected by the people. The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article.

Any such executive officer of a corporation may, notwithstanding any other provision of this Article, be exempt from the coverage of the corporation's insurance contract by such corporation specifically excluding such executive officer in such contract of insurance and the exclusion to remove such executive officer from the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus exempted from the coverage of the insurance contract shall not be employees of such corporation under this Article.

All county agricultural extension service employees who do not receive official federal appointments as employees of the United States Department of Agriculture and who are field faculty members with professional rank as designated in the memorandum of understanding between the North Carolina Agricultural Extension Service, North Carolina State University, A & T State University and the boards of county commissioners shall be deemed to be employees of the State of North Carolina. All other county agricultural extension service employees paid from State or county funds shall be deemed to be employees of the county board of commissioners in the county in which the employee is employed for purposes of workers' compensation.

The term employee shall also include members of the Civil Air Patrol currently certified pursuant to G.S. 143B-491(a) when performing duties in the course and scope of a State approved mission pursuant to Article 11 of Chapter 143B.

Employee shall not include any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities or any combination thereof.

Any sole proprietor or partner of a business or any member of a limited liability company may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner or member of a limited liability company shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

(3) Employer. — The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof.

(4) Person. — The term "person" means individual, partnership, association or corporation.

(5) Average Weekly Wages. — "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of 18 years, sustains a permanent disability or dies leaving dependents surviving, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon a wage sufficient to yield the maximum weekly compensation benefit. Compensation for temporary total disability or for the death of a minor without dependents shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than 52 weeks and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160A-282 or senior members of the State Civil Air Patrol functioning under Article 11, Chapter 143B, under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman or member of an organized rescue squad or member of an auxiliary police department or senior member of the State Civil Air Patrol was earning in the employment wherein he principally earned his livelihood as of the date of injury. Provided, however, that the minimum compensation payable to a volunteer fireman, member of an organized rescue squad or sworn member of an auxiliary police department organized pursuant to G.S. 160A-282, or senior members of the State Civil Air Patrol shall be sixty-six and two thirds percent (66⅔%) of the maximum weekly benefit established in G.S. 97-29.

(6) Injury. — "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. Injury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for unless injury to them is incidental to a compensable injury.

(7) Carrier. — The term "carrier" or "insurer" means any person or fund authorized under G.S. 97-93 to insure under this Article, and includes self-insurers.

(8) Commission. — The term "Commission" means the North Carolina Industrial Commission, to be created under the provisions of this Article.

(9) Disability. — The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(10) Death. — The term "death" as a basis for a right to compensation means only death resulting from an injury.

(11) Compensation. — The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.

(12) Child, Grandchild, Brother, Sister. — The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half

sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under 18 years of age.

(13) Parent. — The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(14) Widow. — The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(15) Widower. — The term "widower" includes only the decedent's husband living with or dependent for support upon her at the time of her death or living apart for justifiable cause or by reason of her desertion at such time.

(16) Adoption. — The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(17) Singular. — The singular includes the plural and the masculine includes the feminine and neuter.

(18) Hernia. — In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.
b. That the hernia or rupture appeared suddenly.
c. Repealed by Session Laws 1987, c. 729, s. 2, effective August 5, 1987.
d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this Article.

(19) Medical Compensation. — The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

(20) Health care provider. — The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and any other person providing medical care pursuant to this Article.

(21) Managed care organization. — The term "managed care organization" means a preferred provider organization or a health maintenance organization regulated under Chapter 58 of the General Statutes. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833; 1983 (Reg. Sess., 1984), c. 1042, s. 1; 1985, cc. 133, 144; 1987, c. 729, ss. 1, 2; 1991, c. 703, s. 1; 1993, c. 389, s. 3; 1993 (Reg. Sess., 1994), c. 679, ss. 2.6, 10.7; 1995, c. 517, s. 35.)

Editor's Note. — Session Laws 1995, c. 517, s. 41, contains a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 2.6, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective July 5, 1994, and applicable to claims pending on or filed after that date.

Legal Periodicals. —

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

CASE NOTES

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I. IN GENERAL.

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Refusal to Accept Tendered Work. — Defendant's argument that the plaintiff was not disabled within the meaning of subsection (9) because they offered him employment consistent with his medical limitations (one functional arm) at no reduction in salary and that plaintiff was barred from compensation for total disability because he unjustifiably refused the tendered employment suitable to his capacity, was rejected. Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993).

Applied in Ross v. Mark's Inc., 120 N.C. App. 607, 463 S.E.2d 302 (1995); Adams v. Kelly Springfield Tire Co., 123 N.C. App. 681, 474 S.E.2d 793 (1996).

Quoted in Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

Stated in Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993).

Cited in Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992); Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996); Murray v. Associated Insurers, Inc., 341 N.C. 712, 462 S.E.2d 490 (1995); Saums v. Raleigh Community Hosp., 124 N.C. App. 219, 476 S.E.2d 372 (1996); Harris v. North Am. Prods., 125 N.C. App. 349, 481 S.E.2d 321 (1997).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

Employees Eligible to Retire. — A claimant's entitlement to a workers' compensation disability award is unrelated to either the claimant's eligibility to retire or his decision to retire. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Sole Proprietors. — Where plaintiff, a sole proprietor, failed to elect to be included as an employee under the workers' compensation coverage of his business, plaintiff did not establish that an employer-employee relationship existed at the time of injury by either electing coverage under subsection (2) or by being an employee under § 97-19. Thus, the Industrial Commission lacked jurisdiction to hear plaintiff's claim. Southerland v. B.V. Hedrick Gravel & Sand Co., 123 N.C. App. 120, 472 S.E.2d 216 (1996).

Volunteer Fireman to Be Treated as Employees. — Because the Workers' Compensation Act provides the specific calculation for the average weekly wage to be received by volunteer fireman in subsection (5), it is implicit that volunteer firemen are to be treated as employees under the Act. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

B. State and Municipal Employees.

Police Officers. — Even if plaintiff's preexisting knee condition contributed to the injury, plaintiff's fall while pursuing a fleeing suspect at night was a risk attributable to his employment as a police officer for defendant and was compensable. Mills v. City of New Bern, 122 N.C. App. 283, 468 S.E.2d 587 (1996).

School Employees. — School worker who was employed 42 weeks per year by the school system and worked odd jobs the other 10 weeks was entitled to receive the average of her weekly income for the last 52 weeks, taking into account both jobs. McAninch v. Buncombe County Schs., 122 N.C. App. 679, 471 S.E.2d 441 (1996).

C. Regular Employment of Four (Now Three) or More.

Evidence Held Sufficient to Show Minimum Number of Persons Regularly Employed. —

Defendants were subject to the Industrial Commission's jurisdiction where there was evidence that defendants employed, with some constancy, at least four people for the year 1987, even though there were only three regularly employed workers on the day plaintiff was injured. Grouse v. DRB Baseball Mgt., Inc., 121 N.C. App. 376, 465 S.E.2d 568 (1996).

H. Apprentices.

While plaintiff may have been a student at a technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

K. National Guard.

Injury During Initial Training. — Plaintiff was an employee of the State when he was injured at federal mandatory initial training, required before serving as a member of the National Guard by 10 U.S.C. 511(d) (which did not exist when the second sentence of this subsection was written), and accordingly was entitled to compensation under the Worker's Compensation Act because his injury arose out of and in the course of his employment with the National Guard. Britt v. North Carolina Dep't of Crime Control & Pub. Safety, 108 N.C. App. 777, 425 S.E.2d 11 (1993).

Weekend Drill. — Plaintiff, injured while performing his duties as a member of the National Guard on a routine weekend drill, was entitled to worker's compensation for injuries. Duncan v. North Carolina Dep't of Crime Control & Pub. Safety, 113 N.C. App. 184, 437 S.E.2d 654 (1993).

III. AVERAGE WEEKLY WAGES.

A. In General.

The determination of the plaintiff's 'average weekly wages' requires application of § 97-2(5) and case law and thus raises an issue of law; thus, any mistake made by either of the parties is not a basis for setting the agreement aside. Swain v. C & N Evans Trucking Co., — N.C. App. —, 484 S.E.2d 845 (1997).

Average Weekly Wages Related to Earnings Not Earning Capacity. — Nothing in the statute defining average weekly wages warranted a conclusion that plaintiff business owner was entitled to payment at the minimum rate of $30.00 per week based on a finding that his business failed to show a net profit for the fifty-two weeks preceding his injury. Under this section, average weekly wages must be related to an employee's earnings, not to his earning capacity. McAnelly v. Wilson Pallet & Crate Co., 120 N.C. App. 127, 460 S.E.2d 894 (1995).

When evaluating a disability, an employee's earning capacity must be measured by the employee's own ability to compete in the labor market, and employee ownership of a business can support a finding of earning capacity only to the extent the employee is actively involved in the personal management of that business and only to the extent that those management skills are marketable in the labor market. McGee v. Estes Express Lines, 125 N.C. App. 298, 480 S.E.2d 416 (1997).

Most Accurate Reflection. — The Industrial Commission correctly determined claimant's earning capacity as an independent contractor under the fourth method listed in subsection (5) by averaging plaintiff's net income for the years 1988 and 1989; this interpretation most accurately reflected claimant's earning capacity. Holloway v. T.A. Mebane, Inc., 111 N.C. App. 194, 431 S.E.2d 882 (1993).

Deduction of Expenses. — When an employee is paid a set price for doing a particular job, it is proper to deduct the expenses incurred in producing that revenue in calculating the average weekly wages; however, the Industrial Commission is not required to deduct the expenses if this method does not produce a fair result to the employer and employee. Craft v. Bill Clark Constr. Co., 123 N.C. App. 777, 474 S.E.2d 808 (1996).

B. Illustrative Cases.

Reduction as a Result of Bankruptcy. — Where, as a result of the bankruptcy of first company decedent worked at, employee's wages at second company were depressed, Industrial Commission erred by failing to consider evidence of employee's wages at first company during the 52 weeks preceding his death. Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995).

Pulpwood Cutter. —

Where contractor was held liable for the payment of compensation for the death of a subcontractor engaged in cutting and hauling timber, the Commission should have considered a reasonable rate of depreciation on the equipment of the subcontractor as a business expense in determining the subcontractor's earnings, or alternatively, the Commission might have considered what the subcontractor would have been required to pay someone else to perform his work, or his income as reported on tax returns from earlier years showing his own income derived from similar work. Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

IV. COMPENSABLE INJURIES, GENERALLY.

Specific Hour of Injury Need Not Be Alleged. — While the case law interpreting the specific traumatic incident provision of subsection (6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury. Fish v. Steelcase, Inc., 116 N.C. App. 703, 449 S.E.2d 233 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995).

Back Injuries. —

Nothing in subsection (6) precludes compensation for a back injury which occurs in the normal work routine. Fish v. Steelcase, Inc., 116 N.C. App. 703, 449 S.E.2d 233 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995).

Mental Impairments. — As long as the resulting disability meets statutory requirements, mental impairments are compensable under the Act. Jordan v. Central Piedmont Community College, 124 N.C. App. 112, 476 S.E.2d 410 (1996).

Employee who alleged that he slipped and fell, injuring his back, while still suffering from a prior work-related injury to his ribs, did not show that employer knew its conduct was substantially certain to cause serious injury or death, since the job he was performing when he fell had been performed the same way for many years without injury, the job involved typical hazards involved with welding, he was a certified welder, falling was not a significant hazard of this particular job, and no O.S.H.A. violations were established with regard to this job. Bullins v. Abitibi-Price Corp., 124 N.C. App. 530, 477 S.E.2d 691 (1996).

V. ACCIDENT.

Plaintiff, who had been employed by defendant for five years in an office job before her work-related injury and who testified that she was not yet proficient in defendant's filling department, was not performing her usual work routine at the time of accidental injury on her fifth day on the production line; thus, the commission's conclusion that the plaintiff suffered an injury by accident was accordingly upheld. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

Heart Attack Held to be Accident. — Where decedent's heart attack followed a period of unusually high exertion which was unusual and not a normal part of his work routine, there was competent evidence to support the findings that death was an accident within the meaning of the Workers' Compensation Act. Wall v. North Hills Properties, Inc., 125 N.C. App. 357, 481 S.E.2d 303 (1997).

"Specific traumatic incident" amendment to subdivision (6) was intended to supplement the law

Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. Glynn v. Pepcom Indus., Inc., 122 N.C. App. 348, 469 S.E.2d 588 (1996).

Evidence Insufficient to Find Back Injury. — Where plaintiff injured her back during her previous employment, was treated for back pain over a period of time, and the pain which plaintiff experienced during her employment with defendant was in the same area of her back that had been injured during plaintiff's prior employment, there was competent evidence to support the Commission's findings and conclusion that plaintiff's back condition was neither caused by nor aggravated by an injury, by accident or by specific traumatic incident at her new employment. Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 458 S.E.2d 746 (1995).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

A. In General.

Injury While Performing Task Which Was Not Part of Job. —

Where the employer did not own or control the public street on which plaintiff was injured, where plaintiff was not performing any duties for employer at the time of the injury and was not exposed to any greater danger than that of the public generally, plaintiff did not suffer an injury arising out of and in the course of his employment. Royster v. Culp, Inc., 343 N.C. 279, 470 S.E.2d 30 (1996).

A volunteer fireman, who is injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

C. In the Course of.

Living in Company Housing. — Where migrant farm worker who lived in company housing was injured while taking a shower after work, although the nature of his employment arguably required that he live on the premises, at the time of his injury he was not on call, and the connection between his employment and his injury was not sufficient to establish that the injury arose out of and in the course of his employment. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

VIII. INJURIES WHILE GOING TO AND FROM WORK.

A. In General.

Injury Suffered Going to or Returning from Work Is Not Generally Compensable. —

Accidents which occur enroute to or from work are not considered within the scope of employment, except when an employee is injured while traveling on property closely tied or annexed to his employer. Smallwood v. Eason, 123 N.C. App. 661, 474 S.E.2d 411 (1996).

But Injury on Employer's Premises May Be Compensable. —

The "coming and going" rule provides that injuries which occur while an employee travels to and from work are not compensable; however, the "premises" exception applies when an employee is injured while on the employer's premises. Jennings v. Backyard Burgers, 123 N.C. App. 129, 472 S.E.2d 205 (1996).

Route Chosen By Employer Not in Course of Employment. — Plaintiff's accidental injury, which resulted from a hazardous condition on property adjacent to his employer's premises, did not arise out of and in the course of employment although defendant employer instructed the employee to use that route for ingress and egress. Jennings v. Backyard Burgers, 123 N.C. App. 129, 472 S.E.2d 205 (1996).

Same — Illustrative Case. — Where decedent was required, as a condition of his employment, to attend a four-week training seminar which was not offered at his regular place of employment, he was on a special errand to attend a training course at the direction of and for the benefit of his employer. Kirk v. State Dep't of Cor., 121 N.C. App. 129, 465 S.E.2d 301 (1995), cert. dismissed, — N.C. —, 472 S.E.2d 336, 472 S.E.2d 337, discretionary review improvidently allowed, 344 N.C. 624, 476 S.E.2d 105 (1996), granted, 343 N.C. 123, 468 S.E.2d 783 (1996).

Accident Returning from Meeting Held Not Part of Duties. — Although plaintiff's presence was required at a meeting after which his accident occurred, his travel from that meeting should not be included within the scope of his employment duties. Being required to drive one's car to a meeting is no different from being required to drive one's car to work. When plaintiff left the meeting he was not traveling to a destination required by his employer nor was he engaged in the furtherance of his employer's business. Wright v. Wake County Pub. Schs., 103 N.C. App. 282, 405 S.E.2d 228 (1991).

XV. HERNIA.

Legislative Use of the Term. — The medical condition known as "hernia" is not specifically defined in either the Worker's Compensation Act or in the case law. Although the Court of Appeals has declined to define the term hernia, it has noted that the legislature's use of the term hernia in conjunction with the word rupture in the statute, "hernia or rupture," seems to indicate that something less than full extension through the organ wall is contemplated. Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

XVI. ILLUSTRATIVE CASES.

D. Miscellaneous Cases.

Injuries to Truck Driver on Route. — Findings of commission that heart attack suffered by truck driver while driving his route was not the result of an accident or occupational disease caused by stress, equipment, and long hours upheld. Dye v. Shippers Freight Lines, 118 N.C. App. 280, 454 S.E.2d 845 (1995).

Subarachnoid Hemorrhage. — Where the evidence indicated that decedent died from a subarachnoid hemorrhage, which is not a compensable cause, the presumption of compensability was not applicable and the Commission did not err by not applying it. Gilbert v. Entenmann's, Inc., 113 N.C. App. 619, 440 S.E.2d 115 (1994).

XVII. DISABILITY.

To obtain an award of compensation, etc. —

To establish disability a claimant must prove: (1) he was incapable of earning the same wages in the same employment, (2) he was incapable of earning the same wages in any other employment, and (3) his incapacity to earn was caused by the injury. Arrington v. Texfi Indus., 123 N.C. App. 476, 473 S.E.2d 403 (1996).

Under the act, disability refers not to physical infirmity, etc. —

In order to receive disability compensation under the Worker's Compensation Act, the mere fact of an on the job injury is not sufficient; the injury must have impaired the worker's earning capacity. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions. i.e. age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Award of Disability Benefits Appropriate Remedy. — Where the full Commission found that defendants had not presented convincing evidence that defendant-store had offered or obtained employment for plaintiff consistent with her limitations, and where plaintiff met the burden of showing injury to her wage earning capacity, the full Commission was correct in finding that the disability continued, and ongoing award of disability benefits was the appropriate remedy. Simmons v. Kroger Co., 117 N.C. App. 440, 451 S.E.2d 12 (1994).

Plaintiff, after having shown credible evidence of diligent efforts to find employment, was entitled to receive compensation benefits where his inability to earn the same wages was caused in part by unavailability of area jobs consistent with his physical limitations. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), cert. denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

Disability Not Presumed Where Payments Not Shown to be Payable During Disability. — Presumption that disability continued until plaintiff returned to work did not apply, where parties stipulated plaintiff sustained injury arising out of and in the course of her employment, and parties stipulated Form 21 and Form 26 agreements were approved in which defendant admitted plaintiff was paid for compensation "for temporary total disability for a period not specifically identified in the record", but the record did not include the forms or reveal whether payments made by defendant were payable during disability. Hoyle v. Carolina Associated Mills, 122 N.C. App. 462, 470 S.E.2d 357 (1996).

Presumption of Disability Created. — In a general sense, it is true an injured employee has the burden of showing he is incapable of earning the same wages he previously earned, either in the same or any other employment; however, upon execution of a Form 21 agreement, and subsequent approval by the Commission, the employee enjoys a presumption of disability. King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996).

The approval of a Form 21 by the Industrial Commission relieves the employee of his initial burden of proving a disability; further, once an agreement is approved, the employee receives the benefit of the presumption that he is totally disabled. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

XVIII. BURDEN OF PROOF AND EVIDENCE.

Evidence of Effort to Find Other Employment. — An injured employee seeking an award of total disability under this section who is unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable, must produce evidence of reasonable effort to find other employment. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Commission's Factual Determinations Binding Upon Court. — Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

Insufficient Evidence of Earning Capacity. — There was no competent evidence to support the Commission's findings that plaintiff was capable of earning $12.00 per hour, that other suitable jobs for which plaintiff was qualified were available, that any other positions for which plaintiff was qualified would pay $12.00 per hour, that plaintiff would be able to secure such a position, and that plaintiff's ability to obtain a temporary position paying $12.00 per hour meant that plaintiff, when permanently employed, would receive $12.00 per hour. Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994).

Termination of Benefits. — Absent waiver, in order to terminate an employee's benefits after execution of a Form 21 agreement, the employer must request a hearing at which it bears the burden of showing the employee is no longer disabled. King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996).

An employer may rebut the continuing presumption of total disability either by showing the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

XIX. COMPENSATION.

Calculation Based on Wages at Time of Diagnosis. — Plaintiff who was diagnosed with silicosis was entitled to compensation calculated based on his average weekly wage at the time he was diagnosed, not at the time of his last exposure or at the time he was "removed from the industry". Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996).

XX. CHILD, GRANDCHILD, ETC.

Illegitimate Child. —

To qualify for survivor's benefits under the act, an illegitimate child must be acknowledged in sufficient fashion by the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Legal Adoption Incomplete. — Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee. Lennon v. Cumberland County, 119 N.C. App. 319, 458 S.E.2d 240 (1995).

XXI. WIDOW AND WIDOWER.

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

"Justifiable Cause" for Living Separate and Apart. —

There is no specific formula for the definition of "justifiable cause" under the statute. A court must consider the complexity and history of the particular relationship in order to determine whether the marital partners were separated for justifiable cause in the months before the death of a recipient of benefits. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Adultery. — A wife's adulterous affair did not bar her from qualifying as her husband's widow under subdivision (14) of this section and § 97-39. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

It is not within the authority of courts to create an exception to subdivision (14) of this section and § 97-39 based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

§ 97-6. No special contract can relieve an employer of obligations.

CASE NOTES

Cited in Tellado v. Ti-Caro Corp., 119 N.C. App. 529, 459 S.E.2d 27 (1995).

§ 97-6.1: Repealed by 1991 (Regular Session, 1992), c. 1021, s. 4, effective October 1, 1992.

Cross References. — For present provisions regarding the subject matter of the repealed section, see § 95-240 et seq.

§ 97-9. Employer to secure payment of compensation.

Legal Periodicals. —

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing

North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

CASE NOTES

Act Provides Exclusive Remedy. — Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Effect of Release Agreement on Employee's Remedies. — Once a plaintiff signs a release agreement to settle a workers' compensation claim that plaintiff is not automatically precluded from recovering pursuant to Woodson v. Rowland, 329 N.C. 33, 407 S.E.2d 222 (1991), and does not automatically admit the injury was solely accidental to the exclusion of a claim against an employer for tortious conduct. Owens v. W.K. Deal Printing, Inc., 113 N.C. App. 324, 438 S.E.2d 440 (1994), rev'd on other grounds, 339 N.C. 603, 453 S.E.2d 160 (1995).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Evidence Insufficient for Exception to Apply. — Where there was no evidence that defendant was aware, prior to employee's death, of a high probability that his equipment would fail, plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), exception to the exclusivity provisions of the Worker's Compensation Act. Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995).

Woodson v. Rowland Elements Existed. — The allegations of misconduct, particularly the directing of the plaintiffs to work on a billboard after notice of its dangerous condition, were sufficient to support a reasonable inference that each of the four elements of a claim existed under Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). Pastva v. Naegele Outdoor Adv., 121 N.C. App. 656, 468 S.E.2d 491 (1996).

Action Under Woodson v. Rowland. — In order for a plaintiff to maintain an action based on Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), plaintiff must establish that employer knew its conduct was substantially certain to cause serious injury or death to the employee. Rose v. Isenhour Brick & Tile Co., 344 N.C. 153, 472 S.E.2d 774 (1996).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993).

Stated in N.C. Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996).

§ 97-10.1. Other rights and remedies against employer excluded.

Legal Periodicals. —

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

CASE NOTES

Employee's Rights and Remedies Hereunder Are Exclusive. —

Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. North Carolina Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

An employee cannot elect to pursue an alternate avenue of recovery, etc. —

Where a prisoner who suffered accidental death arising out of and in the course of the employment to which he had been assigned, his dependents or next of kin were entitled to specific benefits under this Act; therefore, inmate's mother could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Evidence Insufficient for Exception to Apply. — Where there was no evidence that defendant was aware, prior to employee's death, of a high probability that his equipment would fail, plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), exception to the exclusivity provisions of the Worker's Compensation Act. Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, or reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

A volunteer fireman, who is injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

Prisoners. — Workers' compensation is the exclusive remedy for prisoners injured while working on prison jobs. Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501 (1996).

Student Performing Respiratory Therapy at Hospital Gained Apprentice Status. — While plaintiff may have been a student at technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Hence, Separate Tort Action Against Employer Is Barred. —

The monetary benefit afforded to plaintiff by § 97-13(c) entitled her to compensation and this section applied to bar plaintiff's wrongful death action under the Tort Claims Act. Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Wrongful Death Action Precluded. —

Where deceased was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin were statutorily "entitled" to specific benefits under the exclusive remedy provisions of this section, and could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Allegations Sufficient to Withstand Motion to Dismiss. — Allegations of employee who suffered serious injuries when his arm and body were caught in paint machine, for which emergency switches were inoperable, were held sufficient to withstand a motion to dismiss for failure to state a claim. Regan v. Amerimark Bldg. Prods., Inc., 118 N.C. App. 328, 454 S.E.2d 849 (1995).

Summary Judgment Appropriate. — In an action by employee against employer seeking compensatory and punitive damages for accident that occurred at work, the trial court did not err in granting defendant's motion for summary judgment, because no genuine issue of material fact existed as to whether defendant engaged in intentional misconduct knowing this conduct was substantially certain to cause death or serious injury to plaintiff. Vaughan v. J.P. Taylor Co., 114 N.C. App. 651, 442 S.E.2d 538 (1994), cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994).

Cited in Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); Henderson v. Henderson, 121 N.C. App. 752, 468 S.E.2d 454 (1996); Bullins v. Abitibi-Price Corp., 124 N.C. App. 530, 477 S.E.2d 691 (1996).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

Legal Periodicals. —

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act —

Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

CASE NOTES

I. In General.
II. Respective Liability of Third Party, Employer and Carrier.
III. Parties and Procedure.
IV. Disbursement of Proceeds.

I. IN GENERAL.

Legislative Intent. — Absent extenuating circumstances, the Worker's Compensation Act in general and this section specifically were never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tortfeasor. Radzisz v. Harley Davidson of Metrolina, Inc., 346 N.C. 84, 484 S.E.2d 566 (1997).

Choice of Law. — Where all the parties were North Carolina citizens; the plaintiff's contract of employment and the contracts giving rise to the workers' compensation coverage were signed in North Carolina; and the plaintiff was receiving benefits under our workers' compensation statute, North Carolina's interests in implementing the protections afforded by its statute were paramount. An employee's temporary presence in Virginia so as to carry out his employment contract did not strip him of the rights he otherwise enjoyed under the North Carolina workers' compensation statute with regard to the breadth of North Carolina's exclusive remedy bar on common law actions in tort. Braxton v. Anco Elec., Inc., 330 N.C. 124, 409 S.E.2d 914 (1991).

The doctrine of governmental immunity is inapplicable where a defendant alleges a municipality's negligence under subsection (e). Jackson v. Howell's Motor Freight, Inc., — N.C. App. —, 485 S.E.2d 895 (1997).

Amount of Judgment. — Giving the statute its plain meaning requires the court to read the term "judgment" to mean just that, and to reject the argument that the court should look only at the insurance "proceeds" that a party is to receive, as opposed to the entire judgment, in determining the applicability of this section. Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995), aff'd, — N.C. —, 474 S.E.2d 323 (1996).

Evidence of out-of-state worker's compensation payments is admissible in actions against third parties. Frugard v. Pritchard, 338 N.C. 508, 450 S.E.2d 744 (1994).

Interaction with Tort Claims Act. — Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. North Carolina Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

Workers' compensation insurance carrier was entitled to be subrogated, upon reimbursement of the employee, to any payment, including UMIM motorist insurance proceeds made to the employee by or on behalf of a third party as a result of the employee's injury. McMillian v. North Carolina Farm Bureau Mut. Ins. Co., 125 N.C. App. 247, 480 S.E.2d 437 (1997).

Applied in Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); Martinez v. Lovette, 121 N.C. App. 712, 468 S.E.2d 251 (1996); Tise v. Yates Constr. Co., 345 N.C. 456, 480 S.E.2d 677 (1997).

Cited in Hieb v. Lowery, 344 N.C. 403, 474 S.E.2d 323 (1996).

II. RESPECTIVE LIABILITY OF THIRD PARTY, EMPLOYER AND CARRIER.

Evidence of out-of-state worker's compensation payments is admissible in actions against third parties. Frugard v. Pritchard, 338 N.C. 508, 450 S.E.2d 744 (1994).

The workers' compensation carrier for plaintiffs had a subrogation lien on the uninsured motorist policy proceeds paid to plaintiff employee who was injured in an automobile accident occurring while within the scope of employment. Bailey v. Nationwide Mut. Ins. Co., 112 N.C. App. 47, 434 S.E.2d 625 (1993).

III. PARTIES AND PROCEDURE.

Ownership of Policy Irrelevant. — Under this section the distinction between an underinsured motorist policy purchased by the employee and one covering the employee but purchased by his spouse while a resident of the same household is unimportant. Creed v. R.G. Swaim & Son, 123 N.C. App. 124, 472 S.E.2d 213 (1996).

The workers' compensation benefits received by plaintiff under Virginia's Workers' Compensation Act should have been allowed into evidence pursuant to subsection (e) in plaintiff's third party personal injury action. Frugard v. Pritchard, 112 N.C. App. 84, 434 S.E.2d 620 (1993), rev'd on other grounds, 338 N.C. 508, 450 S.E.2d 744 (1994), cert. granted, 335 N.C. 554, 441 S.E.2d 113 (1994).

Retroactive Application. — The trial court's application of the amended version of this section deprived employer and insurer of vested rights under lien and, thus, was unconstitutionally retroactive. Fogleman v. D & J Equip. Rental, Inc., 111 N.C. App. 228, 431 S.E.2d 849, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

IV. DISBURSEMENT OF PROCEEDS.

Evidence of Liability Insurance. — In suit regarding automobile accident, evidence of defendant's liability insurance coverage should not have been introduced just because evidence of plaintiff's recovery in workers' compensation was introduced pursuant to subsection (e). Anderson v. Hollifield, 123 N.C. App. 426, 473 S.E.2d 399 (1996).

Coverage by Same Entity Not Required. — In order to have amounts payable under underinsured motorist coverage reduced by amounts paid under workers' compensation coverage, § 20-279.21(e) does not require that the same entity provide both coverages. Brantley v. Starling, 336 N.C. 567, 444 S.E.2d 170 (1994).

Jurisdiction over Distribution with Court or Commission. — Under this section, the distribution of proceeds received from a tortfeasor between an injured employee and an employer entitled to reimbursement can be decided in some instances by either the Industrial Commission or the trial court. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

The Industrial Commission, not the superior court, had exclusive jurisdiction over distribution of the proceeds recovered from third party tortfeasor where third party judgment exceeded the subrogation claim of the worker's compensation insurance carrier even if the actual proceeds of the judgment were insufficient to compensate the subrogation claim. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Although the Industrial Commission, not the superior court, had exclusive jurisdiction to disburse third party proceeds, the Commission did not have the authority to stay a superior court order, even if the order was in error. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

When a third party judgment is insufficient to compensate the carrier's subrogation claim, or a settlement in a third party action has taken place, the superior court may exercise jurisdiction over distribution of the judgment as to the employee and the carrier. Johnson v. Southern Indus. Constructors, Inc., 484 N.C. App. 574, 484 S.E.2d 574 (1997).

A superior court judge may exercise jurisdiction over disbursement of third party proceeds where there is a substantial likelihood that the amount of a carrier's subrogation claim on benefits to be paid will ultimately be greater than the entire third party judgment. Johnson v. Southern Indus. Constructors, Inc., 484 N.C. App. 574, 484 S.E.2d 574 (1997).

Limitation on Commission; Authority. — The authority of the Industrial Commission to distribute the proceeds of the employer-employee settlement with the tortfeasor is governed by subsection (f) which does not have the authority to make a distribution pursuant to subsection (j). Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Findings of Fact Required to Be Made by Commission. — The commission must make findings of fact regarding the benefits provided for the treatment of an injured employee for which an employer is entitled to reimbursement. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Recovery by Employer of His Underinsured Motorist Benefits. — The employer's underinsured motorist benefits received in an action against the tortfeasor are subject to a subrogation claim by an employer who has paid workers' compensation benefits to its employee. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Lien on Underinsured Motorist Benefits. — Industrial Commission properly concluded that workers' compensation carrier had a lien on the proceeds of plaintiff's underinsured motorist benefits. Creed v. R.G. Swaim & Son, 123 N.C. App. 124, 472 S.E.2d 213 (1996).

Reimbursement. — This section mandates that the payor of benefits be reimbursed with duplicative amounts received by plaintiff employee from a civil suit. Radzisz v. Harley Davidson of Metrolina, Inc., 123 N.C. App. 602, 473 S.E.2d 655 (1996).

Subrogation or Lien Interest. — The Industrial Commission erred in concluding that defendant employer and insurance company were not entitled to a subrogation interest or lien interest against the proceeds received by plaintiff employee in settlement of a civil action. Radzisz v. Harley Davidson of Metrolina, Inc., 123 N.C. App. 602, 473 S.E.2d 655 (1996).

Subrogation of Carrier to Employer's Right to Payment upon Employee Reimbursement. — Subsection (j) is independent from the other subsections in this section, and the Superior Court has discretionary authority to determine the lien amount. Wiggins v. Bushranger Fence Co., — N.C. App. —, 483 S.E.2d 450 (1997).

Lien by Workers' Compensation Carrier. — Workers' compensation carrier had a right to a lien on employee-defendants' potential uninsured motorist benefits. Liberty Mut. Ins. Co. v. Ditillo, 125 N.C. App. 701, 482 S.E.2d 743 (1997).

No Condition Precedent for Subrogation Rights. — The provisions of this statute cannot logically be construed as requiring establishment of a condition precedent in the nature of a written admission or a final award before a payor of workers' compensation benefits obtains subrogation rights. Radzisz v. Harley Davidson of Metrolina, Inc., 123 N.C. App. 602, 473 S.E.2d 655 (1996).

Workers' Compensation Benefits and Uninsured Motorists Coverage. — Defendant insurance company, insurer of vehicle plaintiff was driving at the time of collision, was not entitled to reduce the limits of its uninsured motorists coverage by any amounts paid to plaintiff by her employer's workers' compensation insurance carrier as workers' compensation benefits; employer's workers' compensation insurance carrier was entitled to a lien against all amounts paid or to be paid to plaintiff by defendant insurer of vehicle. Hieb v. St. Paul Fire & Marine Ins. Co., 112 N.C. App. 502, 435 S.E.2d 826 (1993).

§ 97-11. Employer not relieved of statutory duty.

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Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

II. Illustrative Cases.

II. ILLUSTRATIVE CASES.

Employer's Failure to Meet Burden. — Given the presence of competent evidence on both sides of the issue of whether intoxication was a proximate cause of death, the employer did not carry its burden on this issue. Strickland

v. Carolina Classics Catfish, Inc., 119 N.C. App. 97, 458 S.E.2d 10 (1995), aff'd, 342 N.C. 640, 466 S.E.2d 276 (1996).

All of the competent evidence supported the Commission's finding that defendants did not meet their burden of showing that plaintiff's use of controlled substances was a proximate cause of his injury. Bursey v. Kewaunee Scientific Equip. Corp., 119 N.C. App. 522, 459 S.E.2d 40 (1995).

Injury Held Result of Intoxication. — There was competent evidence in the record to support a finding that the deceased was intoxicated where decedent's blood alcohol level of .202, would have rendered her borderline between simple impairment and extreme excitement and confusion. Sidney ex rel. Sidney v. Raleigh Paving & Patching, Inc., 109 N.C. App. 254, 426 S.E.2d 424 (1993).

Injury Held Not Result of Alcohol Withdrawal Seizure. — Where doctor stated that it would not be normal to have an alcohol withdrawal seizure after more than three days and that an alcohol withdrawal seizure probably would not happen five days after consuming alcohol and plaintiff's blood alcohol level was 0.000 at the time of the incident, the Industrial Commission did not err in finding that plaintiff's injury was not approximately caused by an alcohol withdrawal seizure. Tharp v. Southern Gables, Inc., 125 N.C. App. 364, 481 S.E.2d 339 (1997).

Where there was insufficient evidence to establish that the blood alcohol test was scientifically reliable or correctly administered, it could not be used to deny plaintiff's claim pursuant to the intoxication defense in subdivision (1). Johnson v. Charles Keck Logging, 121 N.C. App. 598, 468 S.E.2d 420 (1996).

Rejoining Course of Employment. — Where employee traveled to New York, slept in a motel and ate at restaurants at the direction of his employer, and at the time of the accident resulting in his death, he was returning to his motel from the place where he had eaten dinner, even if his remaining at the restaurant to drink alcohol and watch a ball game constituted a personal endeavor, intoxication was not a cause of his death, and sufficient evidence existed to support the Industrial Commission's finding that he had rejoined his course of employment at the time of the accident. Cauble v. Soft-Play, Inc., 124 N.C. App. 526, 477 S.E.2d 678 (1996).

§ 97-13. Exceptions from provisions of Article.

CASE NOTES

VI. Prisoners.

VI. PRISONERS.

Suspension of Workers' Compensation Benefits During Incarceration. — Imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement. Parker v. Union Camp Corp., 107 N.C. App. 505, 422 S.E.2d 585 (1992).

Action for Wrongful Death. — Where decedent was a prisoner who suffered an accidental death arising out of and in the course of his assigned employment, plaintiff was entitled to workers' compensation benefits under subsection (c). Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Action for Wrongful Death Under Tort Claims Act. —

Where a prisoner who suffered accidental death arising out of and in the course of the employment to which he had been assigned, his dependents or next of kin were entitled to specific benefits under the Act; therefore, inmate's mother could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. North Carolina Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

Where deceased was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin were statutorily "entitled" to specific benefits under the exclusive remedy provisions of § 97-10.1, and could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Working prisoners are excluded from suing in tort for work-related injuries. Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501 (1996).

Workers' Compensation Act Sole Remedy. — A prisoner's exclusive remedy for "accidental injury ... arising out of and in the course of the employment to which he had been assigned," whether he is incarcerated or released, as with other employees, arises under the provisions of the Workers' Compensation Act and is the plaintiff's sole remedy. Richardson v. North Carolina Dep't of Cors., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

The monetary benefit afforded to plaintiff by subsection (c) entitled her to compensation and § 97-10.1 applied to bar plaintiff's wrongful death action under the Tort Claims Act. Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Workers' compensation is the exclusive remedy for prisoners injured while working on prison jobs. Richardson v. North Carolina Dep't of Cor., 345 N.C. 128, 478 S.E.2d 501 (1996).

§ 97-17. Settlements allowed in accordance with Article.

Legal Periodicals. —

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

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When Approved by the Commission. —

Agreement between worker and employer to pay worker compensation, which is approved by the Industrial Commission, becomes an award of the Commission. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Commission May Not Set Aside Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with this section and § 97-82. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Defendant could not establish the existence of any of the factors listed in this section that would require the Commission to set aside a previously approved I.C. Form 26. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996).

Settlement Agreement Was Not Set Aside on Mutual Mistake Ground. — The Industrial Commission properly determined that plaintiff, who suffered a back injury and sought to set aside settlement agreement for payment of workers' compensation, was not entitled to have the agreement set aside pursuant to this section on the basis of mutual mistake. Vernon v. Steven L. Mabe

Bldrs., 110 N.C. App. 552, 430 S.E.2d 676, rev'd in part, petition for discretionary review improvidently granted in part, 336 N.C. 425, 444 S.E.2d 191 (1994).

Employer's Mistaken Representation Agreement Was a "Proper One." — Where documents, stipulations and findings indisputably showed that the parties and Commission acted upon defendant employer's mistaken representation that the original compensation agreement was a "proper one," and since the mistake benefited its initiator to the detriment of the misinformed, acquiescent plaintiff, fundamental equitable principles required that the mistake not be perpetuated. Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

Releases by employers to obtain relief from the obligations created under the Workers' Compensation Act do not bar a retaliatory discharge claim under former § 97-6.1. Tellado v. Ti-Caro Corp., 119 N.C. App. 529, 459 S.E.2d 27 (1995).

Payment of Costs and Attorneys Fees. — The Industrial Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996).

The determination of the plaintiff's 'average weekly wages' requires application of § 97-2(5) and case law and thus raises an issue of law; thus, any mistake made by either of the parties is not a basis for setting the agreement aside. Swain v. C & N Evans Trucking Co., — N.C. App. —, 484 S.E.2d 845 (1997).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

§ 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) When the employer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid. Compensation thereafter shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period. Upon paying the first installment of compensation and upon suspending, reinstating, changing, or modifying such compensation for any cause, the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun, or has been suspended, reinstated, changed, or modified. A copy of each notice shall be provided to the employee. The first notice of payment to the Commission shall contain the date and nature of the injury, the average weekly wages of the employee, the weekly compensation rate, the date the disability resulting from the injury began, and the date compensation commenced.

(c) If the employer denies the employee's right to compensation, the employer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury or death, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission. This notification shall (i) include the name of the employee, the name of the employer, the date of the alleged injury or death, the insurer on the risk, if any, and a detailed statement of the grounds upon which the right to compensation is denied, and (ii) advise the employee of the employee's right to request a hearing pursuant to G.S. 97-83.

(d) In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section. Prior to the expiration of the 90-day period, the employer or insurer may upon reasonable grounds apply to the Commission for an extension of not more than 30 days. The initiation of payment does not affect the right of the employer or insurer to continue to investigate or deny the compensability of the claim or its liability therefor during this period. If at any time during the 90-day period or extension thereof, the employer or insurer contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer or insurer must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article. However, the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier, in which event the employer or insurer may terminate or suspend compensation subject to the provisions of G.S. 97-18.1.

(e) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(f) The employer's or insurer's grounds for contesting the employee's claim or its liability therefor as specified in the notice suspending compensation under subsection (d) of this section are the only bases for the employer's or insurer's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered material evidence that could not reasonably have been discovered prior to the notice suspending compensation.

(g) If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(h) Within 16 days after final payment of compensation has been made, the employer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer a civil penalty in the amount of twenty-five dollars ($25.00).

(i) If any bill for services rendered under G.S. 97-25 by any provider of health care is not paid within 60 days after it has been approved by the Commission and returned to the responsible party, or within 60 days after it was properly submitted, in accordance with the provisions of this Article, to an insurer or managed care organization responsible for direct reimbursement pursuant to G.S. 97-26(g), there shall be added to such unpaid bill an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such medical bill, unless such late payment is excused by the Commission. (1929, c. 120, s. 18½; 1967, c. 1229, s. 2; 1979, c. 249, ss. 1, 2; c. 599; 1993 (Reg. Sess., 1994), c. 679, s. 3.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.1, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective July 5, 1994, and applicable to claims pending on or filed after that date.

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

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Settlement proceeds are not "wages" as a matter of law. Allmon v. Alcatel, Inc., 124 N.C. App. 341, 477 S.E.2d 90 (1996).

The settlement of a claim for federal civil rights violations is not, nor was it intended to be, a substitute for workers' compensation benefits; the settlement agreement clearly reserved all rights to remedies available to plaintiff under the Workers' Compensation Act. Allmon v. Alcatel, Inc., 124 N.C. App. 341, 477 S.E.2d 90 (1996).

Applied in Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Cited in Plummer v. Henderson Storage Co., 118 N.C. App. 727, 456 S.E.2d 886 (1995).

§ 97-18.1. Termination or suspension of compensation benefits.

(a) Payments of compensation pursuant to an award of the Commission shall continue until the terms of the award have been fully satisfied.

(b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1, or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder. The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability.

(c) An employer seeking to terminate or suspend compensation being paid pursuant to G.S. 97-29 for a reason other than those specified in subsection (b) of this section shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission. A copy of the notice shall be filed with the Commission. This form shall contain the reasons for the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension by filing an objection in writing with the Commission within 14 days of the date the employer's notice is filed with the Commission or within such additional reasonable time as the Commission may allow.

(d) If the employee fails to object to the employer's notice of proposed termination or suspension within the time provided, the Commission may enter an appropriate order terminating or suspending the compensation if it finds that there is a sufficient basis under this Article for this action. If the employee files a timely objection to the employer's notice, the Commission shall conduct an informal hearing by telephone with the parties or their counsel. If either party objects to conducting the hearing by telephone, the Commission may conduct the hearing in person in Raleigh or at another location selected by the Commission. The parties shall be afforded an opportunity to state their position and to submit documentary evidence at the informal hearing. The employer may waive the right to an informal hearing and proceed to the formal hearing. The informal hearing, whether by telephone or in person, shall be conducted only on the issue of termination or suspension of compensation and shall be conducted within 25 days of the receipt by the Commission of the employer's notice to the employee unless this time is extended by the Commission for good cause. The Commission shall issue a decision on the employer's application for termination of compensation within five days after completion of the informal hearing. The decision shall (i) approve the application, (ii) disapprove the application, or (iii) state that the Commission is unable to reach a decision on the application in an informal hearing, in which event the Commission shall schedule a formal hearing pursuant to G.S. 97-83 on the employer's application for termination of compensation. Compensation may be terminated or suspended by the employer following an informal hearing only if its application is approved. If the Commission was unable to reach a decision in the informal hearing, the employee's compensation shall continue pending a decision by the Commission in the formal hearing. The Commission's decision in the informal hearing is not binding in subsequent hearings.

The employer or the employee may request a formal hearing pursuant to G.S. 97-83 on the Commission's decision approving or denying the employer's application for termination of compensation. A formal hearing under G.S. 97-83 ordered or requested pursuant to this section shall be a hearing de novo on the employer's application for termination or suspension of compensation and may be scheduled by the Commission on a preemptive basis.

(e) At an informal hearing on the issue of termination or suspension of compensation, and at any subsequent hearing, the Commission may address related issues regarding the selection of medical providers or treatment under G.S. 97-25, subject to exhaustion of the dispute resolution procedures of a managed care organization pursuant to G.S. 97-25.2. (1993 (Reg. Sess., 1994), c. 679, ss. 3.6, 10.9.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(a), made this section effective October 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.9, which amended this section, was effective January 1, 1995, and applicable to claims pending on or filed after that date.

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article.

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766; 1973, c. 1291, s. 10; 1979, c. 247, s. 2; 1987, c. 729, s. 4; 1989, c. 637; 1991, c. 703, s. 7; 1993 (Reg. Sess., 1994), c. 679, s. 10.6; 1995, c. 517, s. 36; 1995 (Reg. Sess., 1996), c. 555, s. 1.)

Editor's Note. — Session Laws 1995, c. 517, s. 41, contains a severability clause.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 10, 1996, in the first paragraph, twice deleted "any such subcontractor, any principal or partner of such subcontractor or" preceding "any employee of such subcontractor."

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Editor's Note. — *The annotation to Carroll v. Daniels & Daniels Constr. Co., 96 N.C. App. 649, 386 S.E.2d 752, cert. granted, 326 N.C. 594, 393 S.E.2d 874 (1990), which appears under this section in the main volume beneath the catchline:* ***"Defendant-Carrier Estopped from Denying Coverage",*** *should be disregarded. The North Carolina Supreme Court reversed this decision in Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990). The latter decision is also annotated under section in the main volume beneath the catchlines:* ***"In order to extend workers' compensation insurance contract,"*** *etc., and* ***"Evidence Insufficient to Support Estoppel of Carrier."***

The 1987 amendment clearly extended the class of persons protected by this provision to include not only employees of the subcontractor but also the subcontractor himself. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

Exclusive Remedy. — Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

This section protects the employees of a subcontractor, etc. — When a principal contractor sublets part of the contract to an independent contractor, that independent contractor's employees are protected by this section if the independent contractor is uninsured. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

But subcontractor is not entitled to immunity from civil suit merely because principal contractor secured workers' compensation insurance coverage for subcontractor's employees. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

Jurisdiction Over Claim by Subcontractor Present. — This section (as in effect between August 5, 1987 and June 10, 1996) extends workers' compensation benefits to subcontractors under the same conditions as it extends coverage to employees of subcontractors, thereby giving the Industrial Commission jurisdiction over a claim by plaintiff, a subcontractor, which arose on December 12, 1990. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

General Contractor Liable for Subcontractor's Injuries. — Where, prior to the time of subcontracting the performance of roofing work, the general contractor did not require from the subcontractor, plaintiff, a certificate of insurance, and general contractor did not obtain from the Industrial Commission a certificate stating that plaintiff had complied with § 97-93, the general contractor was liable for plaintiff's injuries pursuant to this section as it existed at the time of plaintiff's accident. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

Sole Proprietor Not Employee. — Where plaintiff, a sole proprietor, failed to elect to be included as an employee under the workers' compensation coverage of his business, plaintiff did not establish that an employer-employee relationship existed at the time of injury by either electing coverage under § 97-2(2) or by being an employee under this section. Thus, the Industrial Commission lacked jurisdiction to hear plaintiff's claim. Southerland v. B.V. Hedrick Gravel & Sand Co., 123 N.C. App. 120, 472 S.E.2d 216 (1996).

Principal Contractor Not Employee. — Principal contractor was not a statutory employer under this section, and therefore, was not liable for the payment of workers' compensation benefits. Patterson v. Markham & Assocs., 123 N.C. App. 448, 474 S.E.2d 400 (1996).

Applied in Dalton v. Anvil Knitwear, 119 N.C. App. 275, 458 S.E.2d 251 (1995).

Quoted in Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992).

Cited in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Article shall be guilty of a Class 3 misdemeanor and upon conviction thereof shall be punished only by a fine of not more than five hundred dollars ($500.00). No agreement by an employee to waive his right to compensation under this Chapter shall be valid. (1929, c. 120, s. 21; 1993, c. 539, s. 677; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 677, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Cited in Patterson v. Markham & Assocs., 123 N.C. App. 448, 474 S.E.2d 400 (1996).

§ 97-22. Notice of accident to employer.

CASE NOTES

Commission's Findings Conclusive, etc. — Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

§ 97-24. Right to compensation barred after two years; destruction of records.

(a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article. The provisions of this subsection shall not limit the time otherwise allowed for the filing of a claim for compensation for occupational disease in G.S. 97-58, but in no event shall the time for filing a claim for compensation for occupational disease be less than the times provided herein for filing a claim for an injury by accident.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this Article, and if the Commission, or the appellate courts on appeal, shall adjudge that such claim is not within the Article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this Article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years in the discretion of the Commission, with and by the authorization and approval of the Department of Cultural Resources, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766; 1955, c. 1026, s. 12; 1973, c. 476, s. 48; c. 1060, s. 1; 1991, c. 703, s. 8; 1993 (Reg. Sess., 1994), c. 679, s. 3.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.4, which amended this section, was effective January 1, 1995, and applicable to claims pending on or filed after that date.

CASE NOTES

Prerequisites to Equitable Estoppel. — Although defendant furniture company may have thought plaintiff's injuries would be covered by another insurer, neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied. Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

The basis for effecting equitable estoppel is the inconsistent position subsequently taken, rather than in the original conduct and where plaintiff was misled to her detriment, it was under such circumstances that application of the doctrine of equitable estoppel was appropriate. Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

§ 97-25. Medical treatment and supplies.

Medical compensation shall be provided by the employer. Notwithstanding the provisions of G.S. 8-53, any law relating to the privacy of medical records or information, and the prohibition against ex parte communications at common law, an employer paying medical compensation to a provider rendering treatment under this Chapter may obtain records of the treatment without the express authorization of the employee. The Commission shall adopt rules that govern additional methods of oral and written communications between an employer paying compensation under this Chapter and medical care providers. These rules shall protect the employee's right to a confidential physician-patient relationship while facilitating the release of information necessary to the administration of the employee's claim. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission.

Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506; 1955, c. 1026, s. 2; 1973, c. 520, s. 1; 1991, c. 703, s. 3; 1997-308, s. 1.)

Effect of Amendments. — The 1997 amendment, effective July 17, 1997, added the second, third, and fourth sentences of the first paragraph.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev.1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

I. In General.
II. What Treatment Must Be Provided.
III. Refusal to Accept Treatment.
V. Selection of Physician by Employee.

I. IN GENERAL.

The legislature intended (1) that medical compensation, including hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in this section; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended that the Industrial Commission's authority under this section be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

No "Change of Condition" Requirement. — Nothing in the language of this section implies that the "change of condition" requirement of § 97-47 applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The complete absence of an express or implied reference in this section to any "change of condition" requirement, in addition to this section's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Construction with § 97-47. — Because "compensation" does not include the payment of medical expenses, the provisions of § 97-47 do not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of this section. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Burden of Proof. — The Industrial Commission committed legal error by placing the burden on plaintiff/employee to prove causation of her headaches where she met this burden in prior proceeding. Parsons v. Pantry, Inc., — N.C. App. —, 485 S.E.2d 867 (1997).

Applied in Braswell v. Pitt County Mem. Hosp., 106 N.C. App. 1, 415 S.E.2d 86 (1992); Maynor v. Sayles Biltmore Bleacheries, 116 N.C. App. 485, 448 S.E.2d 382 (1994).

Cited in Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Setzer v. Boise Cascade Corp., 123 N.C. App. 441, 473 S.E.2d 431 (1996); Swain v. C & N Evans Trucking Co., — N.C. App. —, 484 S.E.2d 845 (1997).

II. WHAT TREATMENT MUST BE PROVIDED.

Relief from pain is a legitimate aspect of the "relief" anticipated by future medical treatment under this section. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

Relief from pain constituted "relief" as that term was used in this section prior to 1991 amendment. Radica v. Carolina Mills, 113 N.C. App. 440, 439 S.E.2d 185 (1994).

Pre-existing Condition. — Where a North Carolina Industrial Commission finding that plaintiff's worsening lumbar spine condition was directly related to his original back condition and not caused by a work related accident was supported by competent evidence, the Commission did not err in denying plaintiff's claim for additional compensation and medical treatment. Pittman v. Thomas & Howard, 122 N.C. App. 124, 468 S.E.2d 283 (1996).

Future Medical Expenses for Procedure to Relieve Pain. — Defendants were required to pay for plaintiff's back surgery and related medical expenses as long as the surgery would give plaintiff relief, regardless of whether such surgery would lessen the period of disability or effect a cure for his injury, where, plaintiff contended the surgery would relieve a substantial portion of the pain he was suffering. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

Handicapped Accessible Housing. — An employer's duty to provide other treatment or care is sufficiently broad to include the duty to provide handicapped accessible housing. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

III. REFUSAL TO ACCEPT TREATMENT.

Refusal Defined. — "Refusal", as used in this section, connotes a willful or intentional act. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Brain Damaged Worker Incapable of Refusal. — Where the injury to the worker included brain damage to the extent that he became incapable of cooperating with rehabilitation efforts, the policy of liberality of the Workers' Compensation Act in favor of that injured worker precluded denial of benefits based upon his failure to accept, as opposed to willful refusal of, treatment. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Reasonableness of a refusal to accept treatment by an employee is measured by whether a reasonable person who is motivated to improve his health would accept the proffered treatment. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

Reasonable Person Standard. — In cases where the ability of a claimant to make rational decisions regarding his welfare is at issue, the commission must make findings regarding the claimant's ability to act as a "reasonable person" in weighing medical options and making treatment decisions before denying benefits based on his refusal of treatment. Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

V. SELECTION OF PHYSICIAN BY EMPLOYEE.

Approval of Physician Chosen by Employee. —

The unambiguous language of this statute leaves the approval of a physician within the discretion of the Industrial Commission and the Commission's determination may only be reversed upon a finding of a manifest abuse of discretion. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

§ 97-25.1. Limitation of duration of medical compensation.

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation. (1993 (Reg. Sess., 1994), c. 679, s. 2.5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 679, s. 11.1(g), made this section effective upon ratification, and applicable to injuries by accident occurring on or after that date. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.2. Managed care organizations.

The requirements of G.S. 97-25 may be satisfied by contracting with a managed care organization. Notwithstanding any other provision of this Article, if an employer or carrier contracts with a managed care organization for medical services pursuant to this Article, those employees who are covered by the contract with the managed care organization shall receive medical services for a condition for which the employer has accepted liability or authorized treatment under this Article in the manner prescribed by the contract and in accordance with the managed care organization's certificate of authority; provided that the contract complies with rules adopted by the Commission, consistent with this Article, governing managed care organizations. An employee must exhaust all dispute resolution procedures of a managed care organization before applying to the Commission for review of any issue related to medical services compensable under this Article. Once application to the Commission has been made, the employee shall be entitled to an examination by a duly qualified physician or surgeon in the same manner as provided by G.S. 97-27.

If an employee's medical services are provided through a managed care organization pursuant to this section, subject to the rules of the managed care organization, the employee shall select the attending physician from those physicians who are members of the managed care organization's panel, and may subsequently change attending physicians once within the group of physicians who are members of the managed care organization's panel without approval from the employer or insurer. Additional changes in the attending physician or any change to a physician or examination by a physician not a member of the insurer's managed care organization's panel shall only be made pursuant to the organization's contract or upon reasonable grounds by order of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 2.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.3. Preauthorization.

(a) An insurer may require preauthorization for inpatient admission to a hospital, inpatient admission to a treatment center, and inpatient or outpatient surgery. The insurer's preauthorization requirement must adhere to the following standards:

(1) The insurer may require no more than 10 days advance notice of the inpatient admission or surgery.
(2) The insurer must respond to a request for preauthorization within two business days of the request.
(3) The insurer shall review the need for the inpatient admission or surgery and may require the employee to submit to an independent medical examination as provided in G.S. 97-27(a). This examination must be completed and the insurer must make its determination on the request for preauthorization within seven days of the date of the request unless this time is extended by the Commission for good cause.
(4) The insurer shall document its review findings and determination in writing and shall provide a copy of the findings and determination to the employee and the employee's attending physician, and, if applicable, to the hospital or treatment center.
(5) The insurer shall authorize the inpatient admission or surgery when it requires the employee to submit to a medical examination as provided in G.S. 97-27(a) and the examining physician concurs with the original recommendation for the inpatient admission or surgery. The insurer shall also authorize the inpatient admission or surgery when the employee obtains a second opinion from a physician approved by the insurer or the Commission, and the second physician concurs with the original recommendation for the inpatient admission or surgery. However, the insurer shall not be required by this subdivision to authorize the inpatient admission or surgery if it denies liability under this Article for the particular medical condition for which the services are sought.
(6) Except as provided in subsection (c) of this section, the insurer may reduce its reimbursement of the provider's eligible charges under this Article by up to fifty percent (50%) if the insurer has notified the provider in writing of its preauthorization requirement and the provider failed to timely obtain preauthorization. The employee shall not be liable for the balance of the charges.
(7) The insurer shall adhere to all other procedures for preauthorization prescribed by the Commission.

(b) An insurer may not impose a preauthorization requirement for the following:

(1) Emergency services;
(2) Services rendered in the diagnosis or treatment of an injury or illness for which the insurer has not admitted liability or authorized payment for treatment pursuant to this Article; and
(3) Services rendered in the diagnosis and treatment of a specific medical condition for which the insurer has not admitted liability or authorized payment for treatment although the insurer admits the employee has suffered a compensable injury or illness.

(c) The Commission may, upon reasonable grounds, upon the request of the employee or provider, authorize treatment for which preauthorization is otherwise required by this section but was not obtained if the Commission determines that the treatment is or was reasonably required to effect a cure or give relief.

(d) The Commission may adopt procedures governing the use of preauthorization requirements and expeditious review of preauthorization denials.

(e) A managed care organization may impose preauthorization requirements consistent with the provisions of Chapter 58 of the General Statutes.

(f) A provider that refuses to treat an employee for other than an emergency medical condition because preauthorization has not been obtained shall be immune from liability in any civil action for the refusal to treat the employee because of lack of preauthorization. (1993 (Reg. Sess., 1994), c. 679, s. 2.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-25.4. Utilization guidelines for medical treatment.

(a) The Commission may adopt utilization rules and guidelines, consistent with this Article, for medical care and medical rehabilitation services, other than those services provided by managed care organizations pursuant to G.S. 97-25.2, including, but not limited to, necessary palliative care, physical therapy treatment, psychological therapy, chiropractic services, medical rehabilitation services, and attendant care. The Commission's rules and guidelines shall ensure that injured employees are provided the services and care intended by this Article and that medical costs are adequately contained. In developing the rules and guidelines, the Commission may consider, among other factors, the practice guidelines adopted by the boards and associations representing medical and rehabilitation professionals.

(b) Palliative care rules or guidelines adopted by the Commission may require that the provider (i) supply to the employer a treatment plan, including a schedule of measurable objectives, a projected termination date for treatment, and an estimated cost of services, and (ii) obtain preauthorization from the employer, not inconsistent with the provisions of G.S. 97-25.3. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.5. Utilization guidelines for vocational and other rehabilitation.

The Commission may adopt utilization rules and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services. In developing the rules and guidelines, the Commission may consider, among other factors, the practice and treatment guidelines adopted by professional rehabilitation associations and organizations. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-26. Fees allowed for medical treatment; malpractice of physician.

(a) Fee Schedule. — The Commission shall adopt a schedule of maximum fees for medical compensation, except as provided in subsection (b) of this section, and shall periodically review the schedule and make revisions pursuant to the provisions of this Article.

The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

Prior to adoption of a fee schedule, the Commission shall publish notice of its intent to adopt the schedule in the North Carolina Register and hold a public hearing. The published notice shall include the location,. date and time of the public hearing, the proposed effective date of the fee schedule, the period of time during which the Commission will receive written comments on the proposed schedule, and the person to whom comments and questions should be directed. In addition to publication in the North Carolina Register, the notice may be mailed to parties who have requested notice of the fee schedule hearing. The public hearing shall be held no earlier than 15 days after the publication of the notice. The Commission shall receive written comments for at least 30 days or until the date of the public hearing, whichever is later, after which the Commission may adopt the fee schedule.

The Commission may consider any and all reimbursement systems and plans in establishing its fee schedule, including, but not limited to, the Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter, "State Plan"), Blue Cross and Blue Shield, and any other private or governmental plans. The Commission may also consider any and all reimbursement methodologies, including, but not limited to, the use of current procedural terminology ("CPT") codes, diagnostic-related groupings ("DRGs"), per diem rates, capitated payments, and resource-based relative-value system ("RBRVS") payments. The Commission may consider statewide fee averages, geographical and community variations in provider costs, and any other factors affecting provider costs.

An appeal from a decision of the Commission establishing a fee schedule, by any party aggrieved thereby, shall be to the North Carolina Court of Appeals. The decision of the Commission shall be affirmed if supported by substantial evidence. For the purposes of the appeal, the Commission is a party.

(b) Hospital Fees. — Each hospital subject to the provisions of this subsection shall be reimbursed the amount provided for in this subsection unless it has agreed under contract with the insurer, managed care organization, employer (or other payor obligated to reimburse for inpatient hospital services rendered under this Chapter) to accept a different amount or reimbursement methodology.

Except as otherwise provided herein, payment for medical treatment and services rendered to workers“ compensation patients by a hospital shall be equal to the payment the hospital is authorized to receive for the same treatment or service under the State Plan, provided that:

(1) Payment for inpatient hospital inpatient services provided on or after July 1, 1997, and on or before December 31, 1997, shall not be less than a minimum of ninety percent (90%) nor more than a maximum of one hundred percent (100%) of the hospital's itemized charges as shown on the UB-92 claim form.

(2) Payment for inpatient hospital services provided on or after January 1, 1998, through and including December 31, 1998, shall be not more than a maximum of one hundred percent (100%) of the hospital's itemized charges as shown on the UB-92 claim form nor less than a minimum percentage of such charges that the Commission determines would have been required to have produced an average payment rate equal to ninety-three and one-tenth percent (93.1%) of aggregate charges for all inpatient claims processed by the Commission during the fiscal year ending June 30, 1997.

(3) Payment for inpatient hospital services provided on or after January 1, 1999, shall be not more than a maximum of one hundred percent (100%) of the hospital's itemized charges as shown on the UB-92 claim form nor less than the minimum percentage established annually by the Commission as follows:

a. Beginning in the third quarter (July, August, and September) of 1998, and annually thereafter, the Commission shall review data from the State Plan to ascertain the aggregate hospital itemized charges and aggregate amounts authorized for payment by the State Plan (including payments actually made by the State Plan and deductible, coinsurance, or other amounts for which the patient/insured may have been liable) for inpatient hospital claims paid to participating hospitals by the State Plan during the immediately preceding fiscal year ending June 30. The Commission shall then utilize the data described in the preceding sentence to calculate the extent, if any, to which aggregate State Plan authorized payments were less than aggregate charges on inpatient hospital claims paid by the State Plan during the preceding fiscal year.

b. Beginning in the third quarter (July, August, and September) of 1998, and annually thereafter, the Commission shall calculate aggregate hospital itemized charges and aggregate payments authorized by the Commission on all inpatient hospital workers“ compensation claims approved for payment by the Commission during the preceding fiscal year ending June 30.

c. Based on the data described in sub-subdivisions a. and b. of this subdivision, the Commission shall on or before December 1, 1998, and December 1 of each subsequent year establish a minimum percentage that will result in a payment rate for inpatient workers" compensation cases that in the aggregate bears a percentage relationship to hospital itemized charges that is equal to the State Plan relationship between aggregate payments authorized and aggregate itemized charges for claims paid by the State Plan during the preceding fiscal year ending June 30. The percentage rate established shall be effective for the next succeeding calendar year beginning January 1 of that year.

Notwithstanding any other provisions of law, the Commission's determination of payment rates under this subsection shall:

(1) Comply with the procedures for adoption of a fee schedule established in G.S. 97-26(a);

(2) Include publication on or before October 1 of each year of the proposed payment rate, and a summary of the data and calculations on which the rate is based;

(3) Be subject to the declaratory ruling provisions of G.S. 150B-4; and

(4) Be deemed to constitute a final permanent rule under Article 2A of Chapter 150B for purposes of judicial review under Article 4 of that Chapter.

Payment for a particular type of medical compensation that is not covered under the State Plan shall be based on the allowable charge under the State Plan for comparable services or treatment, as determined by the Commission.

A hospital's itemized charges on the UB-92 claim form for workers" compensation services shall be the same as itemized charges for like services for all other payers.

(c) Maximum Reimbursement for Providers Under Subsection (a). — Each health care provider subject to the provisions of subsection (a) of this section shall be reimbursed the amount specified under the fee schedule unless the provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology. In any instance in which neither the fee schedule nor a contractual fee applies, the maximum reimbursement to which a provider under subsection (a) is entitled under this Article is the usual, customary, and reasonable charge for the service or treatment rendered. In no event shall a provider under subsection (a) charge more than its usual fee for the service or treatment rendered.

(d) Information to Commission. — Each health care provider seeking reimbursement for medical compensation under this Article shall provide the Commission information requested by the Commission for the development of fee schedules and the determination of appropriate reimbursement.

(e) When Charges Submitted. — Health care providers shall submit charges to the insurer or managed care organization within 30 days of treatment, within 30 days after the end of the month during which multiple treatments were provided, or within such other reasonable period of time as allowed by the Commission. If an insurer or managed care organization disputes a portion of a health care provider's bill, it shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges in accordance with this Article or its contractual arrangement.

(f) Repeating Diagnostic Tests. — A health care provider shall not authorize a diagnostic test previously conducted by another provider, unless the health care provider has reasonable grounds to believe a change in patient condition may have occurred or the quality of the prior test is doubted. The Commission may adopt rules establishing reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations. A health care provider that violates this subsection shall not be reimbursed for the costs associated with administering or analyzing the test.

(g) Direct Reimbursement. — The Commission may adopt rules to allow insurers and managed care organizations to review and reimburse charges for medical compensation without submitting the charges to the Commission for review and approval.

(h) Malpractice. — The employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26; 1955, c. 1026, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 2.3; 1995 (Reg. Sess., 1996), c. 548, s. 1; 1997-145, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 11.1 provides in part: "This act is effective upon ratification, except as follows:

"(b) G.S. 97-26(b) and G.S. 97-26(f), as enacted in Section 2.3, become effective October 1, 1994. G.S. 97-26(a), as enacted in Section 2.3, is effective upon ratification [July 5, 1994] but the provisions of the third paragraph of said subsection shall not apply to the fee schedule in effect as of the date of ratification of this act [July 5, 1994]."

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective April 1, 1996, and applicable to hospital inpatient admissions occurring on or after that date, in subsection (b) in the first sentence inserted "except as otherwise provided herein" and added at the end the language beginning "provided that such payment" and ending "shown on the #UB-92 claim form", added the present second sentence, and in the last sentence substituted "insurer, managed care organization, or employer" for "insurer or managed care organization." See editor's note for expiration date.

The 1997 amendment, effective June 30, 1997, rewrote subsection (b).

Legal Periodicals. —

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

This section contains the correct measure of employer liability for hospital charges. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended (1) that medical compensation, including hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in § 97-25; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended that the Industrial Commission's authority under § 97-25 be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

§ 97-26.1. Fees for medical records and reports; expert witnesses.

The Commission may establish maximum fees for the following when related to a claim under this Article: (i) the searching, handling, copying, and mailing of medical records, (ii) the preparation of medical reports and narratives, and (iii) the presentation of expert testimony in a Commission proceeding. (1993 (Reg. Sess., 1994), c. 679, s. 5.6.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective upon ratification. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

Legal Periodicals. —

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

Refusal to Undergo Diagnostic Tests. —

The Workers' Compensation Statute does not compel the employer, nor the Industrial Commission, to rely upon one source of medical information, that provided by the injured plaintiff. The statute specifically suspends an injured employee's right to compensation should he or she refuse to submit to examination by a physician designated and paid for by the employer. Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

The Commission erred by admitting the deposition testimony of plaintiff's surgeon in light of the nonconsensual ex parte contact between defendant and plaintiff's surgeon. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996).

Cited in Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 97-29. Compensation rates for total incapacity.

Legal Periodicals. —

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

I. In General.
II. Permanent and Total Disability.

I. IN GENERAL.

Construction with § 97-31. — Where plaintiff may have been entitled to permanent total disability benefits under this section, as well as permanent partial disability benefits under § 97-31 but under this section plaintiff would receive such benefits for as long as he remained totally disabled rather than 45 weeks, and claims employee assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits and his rights, in approving the Form 26 compensation agreement between plaintiff and defendants, the Industrial Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

The Industrial Commission is required to conduct a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both this section and § 97-31 have the benefit of the more favorable remedy. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Commission Erred by Not Assessing Most Munificent Remedy. — The Industrial Commission erred when it awarded permanent disability compensation solely for plaintiff's scheduled hand injury under § 97-31 without assessing whether this section or § 97-30 would provide him a more munificent remedy. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Inability to Obtain Future Employment. — Where an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. Lackey v. R.L. Stowe Mills, Inc., 106 N.C. App. 658, 418 S.E.2d 517, cert. denied, 332 N.C. 345, 421 S.E.2d 150 (1992).

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Handicapped Accessible Housing. — An employer's duty to provide other treatment or care is sufficiently broad to include the duty to provide handicapped accessible housing. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

Psychological injuries are compensable, if at all, under this section or § 97-31 and wage-earning capacity is critical to the assessment of a plaintiff's entitlement to benefits under these sections. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Burden of Proof. — A claimant who asserts that he is entitled to compensation under this section has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to earn wages which in the same or any other employment. Burwell v. Winn-Dixie Raleigh, Inc., 114 N.C. App. 69, 441 S.E.2d 145 (1994).

Evidence of an employer's refusal to allow an employee to return to work because there was no "light" work available supports a finding that the employee is not capable of earning wages in the same employment. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

No Benefits for Unjustifiable Refusal of Employment. — If an employer shows that an employee has unjustifiably refused employment procured for the employee that is suitable to the employee's capacity and the evidence is accepted by the Industrial Commission, the employee is not entitled to any benefits pursuant to this section or § 97-30. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Applied in Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993).

Stated in Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995); Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

II. PERMANENT AND TOTAL DISABILITY.

Establishment of Permanent Incapacity. — Once an employee has reached their maximum medical improvement, the employee may establish permanent incapacity pursuant to either this section, § 97-30 or § 97-31. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

An employee's presumption of disability may not be defeated merely by a return to work. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Once the Form 21 agreement was entered into by the parties and approved by the Commission, a concomitant presumption of disability attached in favor of employee, and the burden of proof was on the employer, not the employee, to demonstrate that plaintiff was no longer entitled to his disability award. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Combination of Compensable and Noncompensable Illnesses. — Where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability under this section. Counts v. Black & Decker Corp., 121 N.C. App. 387, 465 S.E.2d 343 (1996).

There was competent evidence before the Industrial Commission to support its finding that plaintiff's work-related shoulder injury combined with her non-work-related arthritic condition to render her totally disabled. Counts v. Black & Decker Corp., 121 N.C. App. 387, 465 S.E.2d 343 (1996).

Total Incapacity from Emotional Disturbance Caused by Injury. —

If an employee suffers a compensable injury and the injury causes an emotional disturbance which renders him unable to work, he is entitled to compensation for total incapacity under this section. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Loss of Both Legs. — Section 97-31(17) provides that the loss of both legs constitutes total and permanent disability to be compensated according to this section, which provides for lifetime benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

Although plaintiff, who had lost both legs, returned to full-time employment, the employee was entitled to on-going benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Evidence of Total Disability Held Sufficient. — Evidence provided by plaintiff's treating physician, occupational therapists, psychological associates, and vocational rehabilitation specialists supported the Commission's finding that plaintiff was unable, as a result of injury sustained in the course and scope of his employment, to earn wages in his former employment or in any other employment. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Evidence of Total Disability Held Insufficient. — There was no evidence in the medical records submitted to the Commission that supported an award of permanent total disability benefits under this section. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996).

Retirement. — Plaintiff was not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease; the pertinent issue was whether plaintiff, subsequent to retirement, experienced a loss in wage-earning capacity. Stroud v. Caswell Ctr., 124 N.C. App. 653, 478 S.E.2d 234 (1996).

§ 97-30. Partial incapacity.

Legal Periodicals. —

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

Establishment of Permanent Incapacity. — Once an employee has reached their maximum medical improvement, the employee may establish permanent incapacity pursuant to either this section, § 97-29 or § 97-31. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Section 97-31 Compared. —

An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under this section; while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in § 97-31. In fact, an employee who sustains both general and specific injuries may recover benefits under both this section and § 97-31. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Unjustifiable Refusal of Employment. — If an employer shows that the employee has unjustifiably refused employment procured for him that is suitable to the employee's capacity and the evidence is accepted by the Industrial Commission, the employee is not entitled to any benefits pursuant to this section or § 97-29. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

When an employee's power to earn is diminished but not obliterated, he is entitled to benefits under this section for a permanent partial disability. Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996).

Commission Erred by Not Assessing Most Munificient Remedy. — The Industrial Commission erred when it awarded permanent disability compensation solely for plaintiff's scheduled hand injury under § 97-31 without assessing whether § 97-29 or this section would provide him a more munificent remedy. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

An employee's presumption of disability may not be defeated merely by a return to work. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Because plaintiff's presumption of post-injury diminished earning capacity was established by plaintiff and unrebutted by defendant, plaintiff was allowed to elect benefits pursuant to this section. Shaw v. UPS, 116 N.C. App. 598, 449 S.E.2d 50 (1994), aff'd per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995).

Employer's failure to tell employee about benefits provided under this section was not sufficient reason to set aside the award where employee-plaintiff entered into an agreement, accepted all the benefits from it, and chose not to contest it until almost two years after entering the agreement. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Exaggerated Post-Injury Earnings. — Where plaintiff's hourly wage after he terminated his employment due to lung impairment was less than he had earned; however, his weekly income was approximately the same as pre-injury due to his working more hours post-injury, plaintiff's actual post-injury earnings were exaggerated and were not a reliable indicator of his earning capacity. Harris v. North Am. Prods., 125 N.C. App. 349, 481 S.E.2d 321 (1997).

Factors other than actual post-injury earnings may be considered in determining an injured employee's post-injury earning capacity. Harris v. North Am. Prods., 125 N.C. App. 349, 481 S.E.2d 321 (1997).

Psychological injuries are compensable, if at all, under § 97-29 or this section and wage-earning capacity is critical to the assessment of a plaintiff's entitlement to benefits under these sections. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Applied in King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); McGee v. Estes Express Lines, 125 N.C. App. 298, 480 S.E.2d 416 (1997).

§ 97-31. Schedule of injuries; rate and period of compensation.

Legal Periodicals. —

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

I. In General.
III. Hands.
IV. Legs.
VII. Disfigurement.
IX. Important Organs.

I. IN GENERAL.

Maximum Medical Improvement. — The healing period ends when after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established; the point at which the injury has stabilized is often called "maximum medical improvement." Horne v. Universal Leaf Tobacco Processors, 119 N.C. App. 682, 459 S.E.2d 797 (1995).

A finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any permanent disability under this section. Silver v. Roberts Welding Contractors, 117 N.C. App. 707, 453 S.E.2d 216 (1995).

Once an employee has reached their maximum medical improvement, the employee may establish permanent incapacity pursuant to either this section, § 97-29 or § 97-30. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Section Construed with § 97-29. — The Industrial Commission is required to conduct a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act, that an injured employee receives the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both § 97-29 and this section have the benefit of the more favorable remedy. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Where plaintiff may have been entitled to permanent total disability benefits under § 97-29, as well as permanent partial disability benefits under this section, but under § 97-29 plaintiff would receive such benefits for as long as he remained totally disabled rather than 45 weeks, and claims employee assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits and his rights, in approving the Form 26 compensation agreement between plaintiff and defendants, the Industrial Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Award Under § 97-29 Upheld. — There was sufficient evidence to support award and the provision of vocational rehabilitation services where the Industrial Commission found that plaintiff was impaired as a result of his head injury and had yet to overcome resistance on the part of potential employers in order to obtain employment and required vocational rehabilitation to assist him in obtaining stable employment. Silver v. Roberts Welding Contractors, 117 N.C. App. 707, 453 S.E.2d 216 (1995).

Section Construed with § 97-30. — An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under § 97-30, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in this section. In fact, an employee who sustains both general and specific injuries may recover benefits under both § 97-30 and this section. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Section Construed with § 97-61.5. — The acceptance of benefits under § 97-61.5 does not necessarily preclude an award under subsection (24) of this section. Hicks v. Leviton Mfg. Co., 121 N.C. App. 453, 466 S.E.2d 78 (1996).

Partial Disability Term. — The term of partial disability, not the term of total and partial disability combined, is to last no longer than 300 weeks less the period of total disability; the 300-week maximum partial disability period includes the time during which temporary total disability is paid or is in addition to the time in which temporary total disability is paid. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Healing Period Ends with Maximum Medical Improvement. — Temporary total disability is payable only during the healing period. The healing period ends when an employee reaches maximum medical improvement; only them does the question of entitlement to permanent disability arise. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Psychological Injury Not Compensable. — Findings and conclusions regarding wage-earning capacity are not required when only scheduled injuries under this section are involved; however, this approach is inadequate for any psychological disability suffered by plaintiff because psychological injuries are not compensable under this section. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Retirement. — Plaintiff was not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease; the pertinent issue was whether plaintiff, subsequent to retirement, experienced a loss in wage-earning capacity. Stroud v. Caswell Ctr., 124 N.C. App. 653, 478 S.E.2d 234 (1996).

Deduction of Period of Total Disability Benefits from Maximum Period for Partial Disability Benefits. — The term of partial disability, not the term of total and partial disability combined, is to last no longer than 300 weeks less the period of total disability; the 300-week maximum partial disability period includes the time during which temporary total disability is paid or is in addition to the time in which temporary total disability is paid. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Applied in King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Benavides v. Summit Structures, Inc., 118 N.C. App. 645, 456 S.E.2d 339 (1995); Brown v. S & N Communications, Inc., 124 N.C. App. 320, 477 S.E.2d 197 (1996); Bullins v. Abitibi-Price Corp., 124 N.C. App. 530, 477 S.E.2d 691 (1996).

III. HANDS.

Consideration of Other Sections. — The Industrial Commission erred when it awarded permanent disability compensation solely for plaintiff's scheduled hand injury under this section without assessing whether § 97-29 or § 97-30 would provide him a more munificent remedy. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Compensation for Injury to Hand and Finger Allowed. — Where plaintiff asserted that she was entitled to compensation under subsection (12) for disability to her hand, in addition to compensation she had already received for disability to her second finger under subsection (3), the claim was not based on unfounded litigiousness; therefore, the awarding of attorney's fees was unwarranted. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996).

IV. LEGS.

Lifetime Benefits for Loss of Legs. — Subsection (17) provides that the loss of both legs constitutes total and permanent disability to be compensated according to § 97-29, which provides for lifetime benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

Resumption of Work. — Although plaintiff, who had lost both legs, returned to full-time employment, he was entitled to on-going benefits. Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

VII. DISFIGUREMENT.

Separate Awards to Be Entered in Cases Involving Facial and Bodily Disfigurement. — Under this section prior to amendment in 1987, in cases where there was both facial and bodily disfigurement, where Commission did not specify in its opinion separate award amounts for each category of disfigurement, but made one award to compensate the injured worker for both types of disfigurement, would be upheld. However, in view of the 1987 amendment, in future cases, separate awards should be entered in cases involving both types of disfigurement. Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991).

In order to be compensated for a bodily disfigurement under subsection (22), the injury must be of such a nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. Blackwell v. Multi Foods Mgt., Inc., — N.C. App. —, 484 S.E.2d 815 (1997).

Burns. — Findings that plaintiff's injury which was caused by a severe burn, looked repulsive, required massage after periods of standing or walking, and limited his employment choices, were sufficient to support finding of disfigurement. Blackwell v. Multi Foods Mgt., Inc., — N.C. App. —, 484 S.E.2d 815 (1997).

IX. IMPORTANT ORGANS.

Loss of Senses of Taste and Smell Is Compensable Under Subdivision (24). —

Claimant who lost the senses of taste and smell was entitled to compensation for permanent damage to the olfactory organ and not for compensation for two separate compensable injuries. Bess v. Tyson Foods, Inc., 125 N.C. App. 698, 482 S.E.2d 26 (1997).

Uterus. — Where plaintiff was permanently deprived of her uterus, an important organ, due to accidental injury, award of $15,000 for permanent loss of her uterus was held to be a proper exercise of discretion by the Industrial Commission. Alva v. Charlotte Mecklenburg Hosp. Auth., 117 N.C. App. 678, 453 S.E.2d 871 (1995).

Bladder. — Award of $11,000 for permanent damage to plaintiff's bladder was proper where there was credible and competent evidence that plaintiff's bladder, an important organ, was permanently damaged. Alva v. Charlotte Mecklenburg Hosp. Auth., 117 N.C. App. 678, 453 S.E.2d 871 (1995).

§ 97-31.1. Effective date of legislative changes in benefits.

Every act of the General Assembly that changes the benefits enumerated in this Chapter shall become law no later than June 1 and shall have an effective date of no earlier than January 1 of the year after which it is ratified. (1981, c. 521, s. 3; 1995, c. 20, s. 11.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.1, "The Workers' Compensation Reform Act of 1994," provides: "G.S. 97-31.1 does not apply to this act [c. 679, which amended the Workers' Compensation Act.]"

Session Laws 1995, c. 20, s. 17 provides that sections 1 through 16 of this act shall become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 are approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 shall become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997.

Effect of Amendments. — The 1995 amendment, effective on or after January 1, 1997, but only if constitutional amendments proposed by 1995, c. 5. ss. 1-2 are approved, substituted "become law" for "have a ratification date of".

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

CASE NOTES

Unjustifiable Refusal of Employment. — If an employer shows that the employee has unjustifiably refused employment procured for the employee that is suitable to the employee's capacity and the evidence is accepted by the Industrial Commission, the employee is not entitled to any benefits pursuant to § 97-29 or § 97-30. Franklin v. Broyhill Furn. Indus., 123 N.C. App. 200, 472 S.E.2d 382 (1996).

Proffered Employment Must Be Suitable. — The plain language of this section requires that the proffered employment be suitable to the employee's capacity; if not, it cannot be used to bar compensation for which an employee is otherwise entitled. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Industrial Commission erred by determining that plaintiff's refusal to accept the job offered by defendant was unjustified without making additional findings regarding the impact plaintiff's psychological injuries had on his wage-earning capacity. McLean v. Eaton Corp., 125 N.C. App. 391, 481 S.E.2d 289 (1997).

Quoted in Benavides v. Summit Structures, Inc., 118 N.C. App. 645, 456 S.E.2d 339 (1995).

Cited in Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 97-32.1. Trial return to work.

Notwithstanding the provisions of G.S. 97-32, an employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article. (1993 (Reg. Sess., 1994), c. 679, s. 4.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(a) made this section effective October 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-33. Prorating in event of earlier disability or injury.

CASE NOTES

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

CASE NOTES

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Stated in Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than thirty dollars ($30.00), per week, and burial expenses not exceeding two thousand dollars ($2,000), to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there

be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco parentis to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments. Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amounts as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to the surviving father or mother. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823; 1951, c. 70, s. 3; 1953, c. 53, s. 1; 1955, c. 1026, s. 8; 1957, c. 1217; 1963, c. 604, s. 3; 1967, c. 84, s. 4; 1969, c. 143, s. 4; 1971, c. 281, s. 3; 1973, c. 515, s. 4; c. 759, s. 4; c. 1308, ss. 3, 4; c. 1357, ss. 1, 2; 1977, c. 409; 1981, c. 276, s. 1; c. 378, s. 1; c. 379; 1983, c. 772, s. 1; 1987, c. 729, s. 9; 1997-301, s. 1.)

Effect of Amendments. — The 1997 amendment, effective July 16, 1997, and applicable to all awards for compensation under Chapter 97 of the General Statutes entered on or after that date, in the last paragraph twice substituted "spouse" for "wife", and deleted "whom the employee has supported, either in whole or in part, for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or upon application of the employer or insurance carrier shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one-half of such commuted amount to such aliens shall fully acquit the employer and the insurance carrier" following "mother".

CASE NOTES

I. In General.
II. Dependents.

I. IN GENERAL.

The express language of this section fixes the rights and liabilities at the time of the employee's death, providing that where there is only one wholly dependent person at the time of decedent's death, all of the death benefits be paid to that person. Allen v. Piedmont Transp. Servs., Inc., 116 N.C. App. 234, 447 S.E.2d 835 (1994).

Applied in Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

Cited in Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994); Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995); Jordan v. Central Piedmont Community College, 124 N.C. App. 112, 476 S.E.2d 410 (1996).

II. DEPENDENTS.

Legal Adoption Not Finalized. — Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee. Lennon v. Cumberland County, 119 N.C. App. 319, 458 S.E.2d 240 (1995).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

CASE NOTES

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Spouse's Adultery Does Not Create an Exception to Statutes. — It is not within the authority of courts to create an exception to § 97-2(14) and this section based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

A wife's adulterous affair did not bar her from qualifying as her husband's widow under § 97-2(14) or this section. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Illegitimate Child Must Be Acknowledged. — To qualify for survivor's benefits under the act, an illegitimate child must be acknowledged in sufficient fashion by the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Cited in Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995); Setzer v. Boise Cascade Corp., 123 N.C. App. 441, 473 S.E.2d 431 (1996).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

Subject to the provisions of G.S. 97-38, if the deceased employee leave neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased employee, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding two thousand dollars ($2,000) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179; 1981, c. 379; 1987, c. 729, s. 10.)

Editor's Note. — The section above is set out to correct an error in the second paragraph.

§ 97-40.1. Second Injury Fund.

(a) There is hereby created a fund to be known as the "Second Injury Fund," to be held and disbursed by the Industrial Commission as hereinafter provided.

For the purpose of providing money for said fund the Industrial Commission may assess against the employer or its insurance carrier the payment of not to exceed two hundred fifty dollars ($250.00) for the loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss, and shall assess not to exceed seven hundred fifty dollars ($750.00) for fifty percent (50%) or more loss or loss of use of each major member, defined as back, foot, leg, hand, arm, eye, or hearing.

(b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under said section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

(3) To pay compensation and medical expense in cases of permanent and total disability resulting from an injury to the brain or spinal cord in the manner and to the extent hereinafter provided.

The additional compensation and treatment expenses herein provided for shall be paid out of the Second Injury Fund exclusively and only to the extent to which the assets of such fund shall permit.

(c) In addition to payments for the purposes hereinabove set forth, the Industrial Commission may, in its discretion, make payments from said fund for the following purposes and under the following conditions:

(1) In any case in which total and permanent disability due to paralysis or loss of mental capacity has resulted from an injury to the brain or spinal cord, the Industrial Commission may, in its discretion enter an award and pay compensation and reasonable and necessary medical, nursing, hospital, institutional, equipment, and other treatment expenses from the Second Injury Fund during the life of the injured employee in cases where the injury giving rise to such disability occurred prior to July 1, 1953, and the last payment of compensation has been made subsequent to January 1, 1941. Such compensation and medical expense shall be paid only from April 4, 1947, and after the employer's liability for compensation and treatment ex-

pense has ended, and in every case in which the injury resulting in paralysis due to injury to the spinal cord occurred subsequent to April 4, 1947, and prior to July 1, 1953, the liability of the employer and his insurance carrier to pay compensation and medical expense during the life of the injured employee shall not be affected by this section.

(2) When compensation is allowed from the fund in any case under subdivision (1) of subsection (c), the Commission may in its discretion authorize payment of medical, nursing, hospital, equipment, and other treatment expenses incurred prior to the date compensation is allowed and after the employer's liability has ended if funds are reasonably available in the Second Injury Fund for such purpose after paying claims in cases of second injuries as specified in G.S. 97-33 and 97-35. Should the fund be insufficient to pay both compensation and treatment expenses, then the said expenses may, in the discretion of the Commission, be paid first and compensation thereafter according to the reasonable availability of funds in the fund. (1953, c. 1135, s. 2; 1957, c. 1396, s. 4; 1963, c. 450, s. 3; 1977, c. 457; 1991, c. 703, s. 11; 1993 (Reg. Sess., 1994), c. 679, s. 6.1.)

§ 97-42. Deduction of payments.

Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week. (1929, c. 120, s. 42; 1993 (Reg. Sess., 1994), c. 679, s. 3.7.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.7, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective September 1, 1994, and applicable to claims pending on or filed after that date.

CASE NOTES

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

Employer Should Not Be Denied Full Credit for Payments Under Private Benefit Plan. —

In order for an employer to receive full credit for voluntary payments made to an injured employee, this section must be interpreted to mean that the amount of the deduction to which an employer, subject to the approval of the Commission, is entitled is the amount of the gross before-tax payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

The ordinary meaning of the language of this section allows an employer, subject to Commission approval, to receive a full dollar-for-dollar credit for all such payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

An employer's entitlement to a credit, etc. —

Where defendant had not accepted claimant's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission, the employer should be awarded a credit for these payments under this section. Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 468 S.E.2d 396 (1996).

Cited in Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

§ 97-44. Lump sums.

CASE NOTES

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-47. Change of condition; modification of award.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

I. In General.
II. Change of Condition.
III. Time Limitations.

I. IN GENERAL.

Section Not Applicable to Claims for Medical Expenses. — This section does not apply to an employee's right to claim medical payments under the Workers' Compensation Act. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Nothing in the language of § 97-25 implies that the "change of condition" requirement of this section applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The proper procedure to end, diminish or increase a compensation award, etc. —

Where the Industrial Commission established an administrative procedure which allowed and condoned the termination of compensation by an employer and the employer's insurance carrier by the mere filing of an Industrial Commission created form (Form 24) notifying the Commission and the employee that compensation was being terminated, the Commission exceeded its authority. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Applied in Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992); Jones v.Candler Mobile Village, 118 N.C. App. 719, 457 S.E.2d 315 (1995).

Cited in Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995); Johnson v. Southern Indus. Constructors, Inc., 484 N.C. App. 574, 484 S.E.2d 574 (1997).

II. CHANGE OF CONDITION.

A change in physical capacity to earn wages alone is sufficient to support an award of additional compensation for change of condition. Dinkins v. Federal Paper Bd. Co., 120 N.C. App. 192, 461 S.E.2d 909 (1995).

A change in condition can consist of either a change in the claimant's physical condition that impacts his earning capacity, a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or a change in the degree of disability even though claimant's physical condition remains unchanged. Blair v. American Television & Communications Corp., 124 N.C. App. 420, 477 S.E.2d 190 (1996).

No "Change of Condition" Requirement for Claims for Medical Expenses. — The complete absence of an express or implied reference in § 97-25 to any "change of condition" requirement, in addition to that statute's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

It was not the intent of the legislature to require an injured employee to make any showing of a change in condition before his employer would be required to pay further medical services or treatment needed as a result of his compensable injury. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995)

Compensation Does Not Include Medical Expenses. — Because "compensation" does not include the payment of medical expenses, this provision does not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of § 97-25. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Change in Physical Capacity to Earn Wages Alone. — Where plaintiff was unable to find another job, due to his severe physical restrictions, coupled with his vocational and educational limits, because the record was rife with testimony that plaintiff suffered a compensable work-related injury which caused damage to the lumbar region of plaintiff's back, and Industrial Commission was able to determine that subsequent accident caused a "temporary flare-up" of plaintiff's pre-existing injury, it followed that plaintiff's change in wage earning capacity must have been a result of that same pre-existing injury; the Commission's findings and conclusions to the contrary were unsupported by the evidence and were therefore reversed. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Difference of Opinion. — Plaintiff did not experience a change of condition where one physician gave him a 15% disability rating, which he accepted, and a second physician gave him a 30% disability rating, where the second physician commented that the discrepancy was a difference of opinion. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Change of Condition Attributed to Pre-existing Condition. — Where a North Carolina Industrial Commission finding that plaintiff's worsening lumbar spine condition was directly related to his original back condition and not caused by a work related accident was supported by competent evidence, the Commission did not err in denying plaintiff's claim for additional compensation and medical treatment. Pittman v. Thomas & Howard, 122 N.C. App. 124, 468 S.E.2d 283 (1996).

Evidence Insufficient to Show Depression Caused a Change in Circumstances. — While two doctors testified that plaintiff was depressed because of his injury, there was no evidence that this depression prevented plaintiff from working, which is essential in order to show a change of condition under this section. Jones v. Candler Mobile Village, 118 N.C. App. 719, 457 S.E.2d 315 (1995).

Burden of Proof. — The burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify. Blair v. American Television & Communications Corp., 124 N.C. App. 420, 477 S.E.2d 190 (1996).

Modification of Award Upheld. — Where evidence before Industrial Commission showed that the continuous pain stemming from plaintiff's injury eventually rendered her totally incapable of earning any wages, this evidence was sufficient to justify the commission's finding and conclusion that a substantial change in plaintiff's back condition had occurred since the initial award. East v. Baby Diaper Servs., Inc., 119 N.C. App. 147, 457 S.E.2d 737 (1995).

III. TIME LIMITATIONS.

Time Period of Change Required. — Where the Industrial Commission found that plaintiff was unable to work for a period of time, yet there was no finding as to the time period during which plaintiff experienced this change a remand was needed since the commission's findings were not sufficient to determine the rights of the parties. Dinkins v. Federal Paper Bd. Co., 120 N.C. App. 192, 461 S.E.2d 909 (1995).

§ 97-47.1. Payment without prejudice; limitations period.

When the employer has paid compensation without prejudice but timely contested liability as provided in G.S. 97-18(d), the right, if any, to further indemnity compensation and medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation, whichever last occurs, unless the employee files with the Commission a claim for further compensation prior to the expiration of this period. (1993 (Reg. Sess., 1994), c. 679, s. 3.5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(f), made this section effective January 1, 1995, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Subsection (d) of G.S. 97-18, referred to above, was redesignated as subsection (f).

§ 97-52. Occupational disease made compensable; "accident" defined.

Legal Periodicals. —

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

CASE NOTES

Cited in Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

Legal Periodicals. —

For comment, "A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims," see 32 Wake Forest L. Rev. 193 (1997).

CASE NOTES

I. In General.
II. Subdivision (13).
III. Particular Diseases.

I. IN GENERAL.

Appellate Review Limited. — Review of Industrial Commission decisions is limited to a determination of whether there was competent evidence before the Commission to support its findings and whether such findings support its legal conclusions; the Court of Appeals cannot substitute its judgment for that of the Commission. Findings of fact, when supported by competent evidence, are conclusive on appeal. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Proof of Inability to Earn. — Plaintiffs may prove they were incapable after injury of earning the same wages they had earned before injury in any other employment in one of four ways: (1) the production of medical evidence that they are physically or mentally, as consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that they are capable of some work, but have, after a reasonable effort been unsuccessful in their effort to obtain employment; (3) the production of evidence that they are capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, or lack of education, to seek other employment; or (4) the production of evidence that they have obtained other employment at a wage less than that earned prior to the injury. Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

Cited in Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991); Walters v. Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995), cert. denied, 342 N.C. 665, 467 S.E.2d 736, aff'd per curiam, 476 S.E.2d 105 (1996), cert. denied, — U.S. —, 117 S. Ct. 1551, 137 L. Ed. 2d 700 (1997); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995); Jordan v. Central Piedmont Community College, 124 N.C. App. 112, 476 S.E.2d 410 (1996).

II. SUBDIVISION (13).

What Plaintiff Must Show Under Subdivision (13). —

The Supreme Court has rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment. Any evaluation of the workplace for the agent in question after claimant's departure would not quantify claimant's exposure, but would merely "guessimate" it. Since the degree of exposure does not need to be measured during claimant's employment, it should not need to be quantified in findings of fact, either. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The substance to which plaintiff was last injuriously exposed need not be in a substance known to cause the disease. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Proof of Causation Is Essential. —

Plaintiff did not meet the burden of showing a causal connection between her back injury and her employment with defendant. Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 458 S.E.2d 746 (1995).

Causal Connection May Be Established, etc. —

Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. Medical opinions given may be based either on personal knowledge or observation or on information supplied him by others, including the patient. Absolute medical certainty is not required. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission Was Not Required to Make Two Separate Findings Regarding Aggravation of Disease. — The terms "significantly contributing to" and "aggravated," regarding exposure to a substance and its effect on a claimant's health, are interchangeable. Therefore, where the Industrial Commission had determined that plaintiff's exposure to cotton dust did not significantly contribute to his disease, it was tantamount to a finding that his disease was not aggravated by his exposure to cotton dust. It was not necessary for the Commission to make two separate findings. Wilkins v. J.P. Stevens & Co., 100 N.C. App. 742, 398 S.E.2d 66 (1990), aff'd, 333 N.C. 449, 426 S.E.2d 675 (1993).

Factors in Determining Significance of Exposure. —

In accord with the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Explicit Findings Required. —

In accord with the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Claimant Has Burden of Proof. —

Claimant has the burden of proof, but if the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Respiratory surfaces of the lungs are "external contact surfaces" of the body, etc. —

Evidence offered was sufficient to support the Industrial Commission's findings that a spontaneous tear of the rotator cuff was an occupational disease within the meaning of subsection (13) of this section. Gibbs v. Leggett & Platt, Inc., 112 N.C. App. 103, 434 S.E.2d 653 (1993).

III. PARTICULAR DISEASES.

Tuberculosis — Plaintiff failed to show correlation between his work as a janitor and the development of tuberculosis, with the exception of his exposure to a coemployee with the disease, or that the nature of a janitorial job increased a person's risk of developing tuberculosis, for tuberculosis to be found to be an occupational disease under subdivision (13). Higgs v. Southeastern Cleaning Serv., 122 N.C. App. 456, 470 S.E.2d 337 (1996).

Stress. — There was sufficient evidence to support the findings of the full commission that plaintiff suffered occupational stress as a result of her employment as a police officer and was entitled to workers' compensation benefits. Pulley v. City of Durham, 121 N.C. App. 688 468 S.E.2d 506 (1996).

§ 97-57. Employer liable.

CASE NOTES

Presumption Created by Section 97-57. — Section 97-57 creates an irrebuttable legal presumption that the last thirty days of work is the period of last injurious exposure. Thus, "an exposure which proximately augmented the disease to any extent, however slight" is deemed the last injurious exposure. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff does not have to establish that the conditions of his employment with the defendant caused or significantly contributed to his disease. He need only show that: (1) he has an occupational disease and (2) he was "last injuriously exposed to the hazards of such disease" in the defendant's employment. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff satisfied his burden of proof and was entitled to workers' compensation benefits where there was an irrebuttable legal presumption that the last thirty days of work subjecting the plaintiff to the hazards of asbestos is the period of last injurious exposure and the Industrial Commission held that plaintiff was exposed to the inhalation during the 48 days he worked for last employer, the defendant. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

§ 97-58. Time limit for filing claims.

CASE NOTES

IV. Filing of Claims.

IV. FILING OF CLAIMS.

When Two-Year Limit Begins to Run. — Two conditions must be met in order to start the two-year statute of limitations running against a claimant: (1) The employee must have suffered an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and (2) the employee has been informed by competent medical authority of the nature and work-related cause of the disease. Rutledge v. Stroh Cos., 105 N.C. App. 307, 412 S.E.2d 901 (1991), cert. denied, 331 N.C. 384, 417 S.E.2d 791 (1992).

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.

The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. The Industrial Commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazard of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the Industrial Commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this Article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the Industrial Commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a Class 1 misdemeanor and shall be punishable as such. (1935, c. 123; 1993, c. 539, s. 678; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 678, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 97-61.1. First examination of and report on employee having asbestosis or silicosis.

When an employee and the Industrial Commission are advised by the Department of Health and Human Services that an employee has asbestosis or silicosis, the employer shall be notified by the Industrial Commission, and the employee, when ordered by the Industrial Commission, shall go to a place designated by the Industrial Commission and submit to X rays and a physical examination by the advisory medical committee, at least one of whom shall conduct the examination, and the member or members of the advisory medical committee conducting the examination shall forward the X rays and findings to the member or members of the committee not present for the physical examination. The employer shall pay the expenses connected with the examination in such amounts as shall be directed by the Industrial Commission. Within 30 days after the completion of the examination, the advisory medical committee shall make a written report signed by all of its members setting forth:

(1) The X rays and clinical procedures used by the committee in arriving at its findings.
(2) Whether or not the claimant has contracted asbestosis or silicosis.
(3) The committee's opinion expressed in percentages of the impairment .of the employee's ability to perform normal labor in the same or any other employment.
(4) Any other matter deemed pertinent by the committee.

When a competent physician certifies to the Industrial Commission that the employee's physical condition is such that his movement to the place of examination ordered by the Industrial Commission as herein provided in G.S. 97-61.1, 97-61.3 and 97-61.4 would be harmful or injurious to the health of the employee, the Industrial Commission shall cause the examination of the employee to be made by the advisory medical committee as herein provided at some place in the vicinity of the residence of the employee suitable for the purposes of making such examination. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1973, c. 476, s. 128; 1989, c. 727, s. 219(15); 1997-443, s. 11A.37.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Department of Health and Human Services" for "Department of Environment, Health, and Natural Resources" in the first sentence.

§ 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.

CASE NOTES

Section Construed with § 97-31. — The acceptance of benefits under this section does not necessarily preclude an award under § 97-31(24). Hicks v. Leviton Mfg. Co., 121 N.C. App. 453, 466 S.E.2d 78 (1996).

Calculation Based on Wage at Time of Diagnosis. — Plaintiff who was diagnosed with silicosis was entitled to compensation calculated based on his average weekly wage at the time he was diagnosed, not at the time of his last exposure or at the time he was "removed from the industry". Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996).

Plaintiff was not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease; the pertinent issue was whether plaintiff, subsequent to retirement, experienced a loss in wage-earning capacity. Stroud v. Caswell Ctr., 124 N.C. App. 653, 478 S.E.2d 234 (1996).

§ 97-63. Period necessary for employee to be exposed.

CASE NOTES

Constitutionality. — This statute denies equal protection of the law under both the North Carolina Constitution and the United States Constitution in that it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason. Walters v. Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995), cert. denied, 342 N.C. 665, 467 S.E.2d 736, aff'd per curiam, 476 S.E.2d 105 (1996), cert. denied, — U.S. —, 117 S. Ct. 1551, 137 L. Ed. 2d 700 (1997).

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.

(a) There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis or treatment of occupational diseases. They shall be appointed by the Industrial Commission with the approval of the Governor, and one of them shall be designated as chairman of the committee by the Industrial Commission. The members of committee shall be appointed to serve terms as follows: one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the Industrial Commission shall appoint a successor for a term of six years. The function of the committee shall be to conduct examinations and make reports as required by G.S. 97-61.1 through 97-61.6 and 97-68 through 97-71, and to assist in any postmortem examinations provided for in G.S. 97-67 when so directed by the Industrial Commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the Industrial Commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

(b) The members of the advisory medical committee shall be paid one hundred dollars ($100.00) per month plus not more than forty dollars ($40.00) per film examined. The fee per film shall be established by the Secretary of Health and Human Services, as guided by the current Medicaid/Medicare reimbursement schedules for North Carolina.

(c) Notwithstanding any other provision of this Article, the Industrial Commission, in its discretion, may designate a qualified physician who is not a member of the advisory medical committee to perform an examination of an employee who has filed a claim for benefits for asbestosis or silicosis. This physician shall file his reports in the same manner a member of the advisory medical committee files reports; and these reports shall be deemed reports of the advisory medical committee. (1935, c. 123; 1955, c. 525, s. 7; 1981, c. 562, s. 2; 1989, c. 439; 1991, c. 481, s. 1; 1997-443, s. 11A.38; 1997-508, s. 1.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1997-443, s. 11A.38, effective August 28, 1997, substituted "Department of Health and Human Services" for "Department of Environment, Health, and Natural Resources" in the second sentence of subsection (b).

Session Laws 1997-508, s. 1, effective September 17, 1997, deleted "except that the terms of the members first appointed shall expire June 30, 1936" at the end of the fourth sentence of subsection (a), changed the fee per film in the first sentence of subsection (b) from $10.00 to $40.00, and added "as guided by the current Medicaid/Medicare reimbursement schedules for North Carolina" at the end of the second sentence of subsection (b).

§ 97-73. Expenses of making examinations.

(a) The Industrial Commission shall establish a schedule of fees for examinations conducted and reports made pursuant to G.S. 97-61.1 through 97-61.6 and 97-67 through 97-71. The fees shall be collected in accordance with rules adopted by the Industrial Commission.

(b) The Secretary of Health and Human Services shall establish a schedule of fees for examinations conducted by the Department of Health and Human Services pursuant to G.S. 97-60. The fees shall be collected in accordance with rules adopted by the Secretary of Health and Human Services.

(c) Fees imposed pursuant to this section shall be collected from employers who by order of the Industrial Commission are determined to be subject to the hazards of asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 8; 1991, c. 481, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 2; 1997-443, s. 11A.39.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective August 28, 1997, substituted "Secretary of Health and Human Services" for "Secretary of Environment, Health, and Natural Resources" in each sentence of subsection (b), and substituted "Department of Health and Human Services" for "Department of Environment, Health, and Natural Resources" in the first sentence of subsection (b).

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

The Industrial Commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The Industrial Commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this Article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of any employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a Class 1 misdemeanor. (1935, c. 123; 1993, c. 539, s. 679; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 679, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

(a) There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of seven commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Of the additional appointments made in 1994, one shall be for a term expiring June 30, 1996, one for a term expiring June 30, 1998, and two for terms expiring June 30, 2000. Upon the expiration of each term as above mentioned, the Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employers, and not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employees.

(b) One member, to be designated by the Governor, shall act as chairman. The chairman shall be the chief judicial officer and the chief executive officer of the Industrial Commission; such authority shall be exercised pursuant to the provisions of Chapter 126 of the General Statutes and the rules and policies of the State Personnel Commission. Notwithstanding the provisions of this Chapter, the chairman shall have such authority as is necessary to direct and oversee the Commission. The chairman may delegate any duties and responsibilities as may be necessary to ensure the proper management of the Industrial Commission. Notwithstanding the provisions of this Chapter, Chapter 143A, and Chapter 143B of the General Statutes, the chairman may hire or fire personnel and transfer personnel within the Industrial Commission.

The Governor may designate one vice-chairman from the remaining commissioners. The vice-chairman shall assume the powers of the chairman upon request of the chairman or when the chairman is absent for 24 hours or more. The authority delegated to the vice-chairman shall be relinquished immediately upon the return of the chairman or at the request of the chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8; 1991, c. 264, s. 1; 1993, c. 399, s. 3; 1993 (Reg. Sess., 1994), c. 769, s. 28.15(a).)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 28.15(a), which amended this section, was effective August 1, 1994, and applicable to appointments made on or after that date.

CASE NOTES

Cited in Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to this section.*

§ 97-77.1. (Expires July 1, 2001) Advisory council.

The chairman of the Commission may appoint an advisory council to advise the chairman on workers' compensation issues and other matters within the jurisdiction of the Commission. The members of the council shall serve at the pleasure of the chairman. The members of the council shall not receive compensation for their service on the council. (1993 (Reg. Sess., 1994), c. 679, s. 5.1; 1997-483, s. 13.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective September 1, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Session Laws 1997-483, s. 13, provides that this act shall be known as "The Studies Act of 1997."

Session Laws 1997-483, s. 13.1, effective July 1, 1997, changed the expiration date of Session Laws 1993 (1994 Reg. Sess.), c. 679, s. 11.1, from July 1, 1997 to July 1, 2001.

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

(a) The salary of each commissioner shall be the same as that fixed from time to time for district attorneys except that the commissioner designated as chair shall receive one thousand five hundred dollars ($1,500) additional per annum.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and who shall be subject to the State Personnel System and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the General Appropriation Act as made to other departments, commissions and agencies of the State government.

(e) The Commission shall publish annually for free distribution a report of the administration of this Article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823; 1957, c. 541, s. 6; 1971, c. 527, s. 1; c. 1147, s. 1; 1983, c. 717, s. 20; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1997-443, s. 33.4.)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective July 1, 1997, rewrote subsection (a).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies who shall have the same power as members of the Commission pursuant to G.S. 97-80 and the same power to take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission. The deputies shall be subject to the State Personnel System.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. Notwithstanding the provisions of this subsection, informal hearings conducted pursuant to the provisions of G.S. 97-18.1, whether by telephone or in person, shall not be open to the public nor stenographically reported unless the Commission orders otherwise.

(e) The Commission, or any member thereof, or any deputy is authorized by appropriate order, to make additional parties plaintiff or defendant in any proceeding pending before the Commission when it is made to appear that such new party is either a necessary party or a proper party to a final determination of the proceeding.

(f) The Commission shall create an ombudsman program to assist unrepresented claimants, employers, and other parties, to enable them to protect their rights under this Article. In addition to other duties assigned by the Commission, the ombudsman shall meet with, or otherwise provide information to, injured employees, investigate complaints, and communicate with employers' insurance carriers and physicians at the request of the claimant. Assistance provided under this subsection shall not include representing the claimant in a compensation hearing. (1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11; 1971, c. 527, s. 2; c. 1147, s. 2; 1981 (Reg. Sess., 1982), c. 1243, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 5.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 11.1 provides that the act is effective upon ratification (July 5, 1994), except as otherwise provided. Section 11.1(a) provides that the amendment to subsection (d) of this section becomes effective October 1, 1994, and applies to claims pending on or filed after that date, and s. 11.1(e) provides that the amendment to subsection (f) of this section becomes effective July 1, 1994.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. The Commission shall request the Office of State Budget and Management to prepare a fiscal note for a proposed new or amended rule that has a substantial economic impact, as defined in G.S. 150B-21.4(b1). The Commission shall not take final action on a proposed rule change that has a substantial economic impact until at least 60 days after the fiscal note has been prepared.

Processes, procedure, and discovery under this Article shall be as summary and simple as reasonably may be.

(b) The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, to administer or cause to have administered oaths, to preserve order at hearings, to compel the attendance and testimony of witnesses, and to compel the production of books, papers, records, and other tangible things.

(c) **(See editor's note)** The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme Court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.

(d) The Commission may order testimony to be taken by deposition and any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Depositions ordered by the Commission upon application of a party shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(e) A subpoena may be issued by the Commission and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the Commission may quash a subpoena if it finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(f) The Commission may by rule provide for and limit the use of interrogatories and other forms of discovery, and it may provide reasonable sanctions for failure to comply with a Commission order compelling discovery.

(g) The Commission or any member or deputy thereof shall have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to hold a person in civil contempt, as provided thereunder, for failure to comply with an order of the Commission, Commission member, or deputy. A person held in civil contempt may appeal in the manner provided for appeals pursuant to G.S. 97-85 and G.S. 97-86. The provisions of G.S. 5A-24 shall not apply to appeals pursuant to this subsection.

(h) The Commission or any member or deputy thereof shall also have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to punish for criminal contempt, subject to the limitations thereunder, (i) for wilful behavior committed during the sitting of the commissioner or deputy commissioner and directly tending to interrupt the proceedings; (ii) for wilful disobedience of a lawful order of the Commission or a member or deputy thereof; or (iii) for wilful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, wilful refusal to answer any legal and proper question when refusal is not legally justified. The Commission or any member or deputy thereof may issue an order of arrest as provided by G.S. 15A-305 when authorized by G.S. 5A-16 in connection with contempt proceedings. When the commissioner or deputy commissioner chooses not to proceed summarily pursuant to G.S. 5A-14, the proceedings shall be before a district court judge, and venue lies throughout the district where the order was issued directing the person charged to appear. A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions to the superior court of the district in which the order of contempt was issued, and the appeal is by hearing de novo before a superior court judge. (1929, c. 120, s. 54; 1977, cc. 456, 505; 1981 (Reg. Sess., 1982), c. 1243, s. 2; 1993, c. 321, s. 25(b); c. 399, s. 1; 1993 (Reg. Sess., 1994), c. 679, ss. 5.3, 5.4; 1995, c. 507, s. 27.8(o); c. 509, s. 48.)

Editor's Note. —

Session Laws 1993, c. 321, s. 25(b) provided that, if HB 658 (Session Laws 1993, c. 399) were enacted, the first sentence of s. 4 of c. 399 would be amended by deleting "only if the General Assembly appropriates funds to implement the purpose of this act." However, this language is in the second sentence of section 5 of Chapter 399 and reads "only if the General Assembly appropriates funds to implement the purpose of these sections."

Session Laws 1993, c. 399, s. 4 provides: "The mediation program authorized by this act shall be evaluated under the direction of the Attorney General who shall file a written report on the evaluation of the program on or before May 1, 1995. One copy of the report shall be sent to the Speaker of the House of Representatives, one copy shall be sent to the President Pro Tempore of the Senate, and five copies shall be sent to the Legislative Services Commission for placement in the Legislative Library."

Session Laws 1993, c. 399, s. 5, which amended this section, provided that ss. 1, 2 and 4 of c. 399 would become effective October 1, 1993 only if the General Assembly appropriated funds to implement the purpose of these sections, and was applicable to claims pending on or filed after that date. Section 5 of c. 399, as amended by Session Laws 1995, c. 358, s. 8(a), c. 437, s. 6(a), and c. 467, s. 5(a), also provided that ss. 1, 2 and 4 would expire June 28, 1995, and applied to claims pending on or filed after the effective date of c. 399. The provision in Session Laws, c. 399, s. 5, that ss. 1, 2 and 4 would expire was deleted by Session Laws 1995, c. 507, s. 25.13.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 5.4, as amended by Session Laws 1995, c. 358, s. 8(b), by Session Laws 1995, c. 437, s. 6(b), and by Session Laws 1995, c. 467, s. 5(b), provided: "Subsection (c) of G.S. 97-80 shall expire July 28, 1995, in accordance with the provisions of Chapter 399 of the 1993 Session Laws, unless the General Assembly amends Chapter 399 of the 1993 Session Laws to provide otherwise." Section 5 of Chapter 399 of the 1993 Session Laws was amended by Session Laws 1995, c. 507, s. 25.13, which deleted the language providing for the expiration of ss. 1, 2 and 4 of Session Laws 1993, c. 399.

Session Laws 1995, c. 507, which amended this section, in s. 27.8(z) provides that the amendment is effective December 1, 1995, and is applicable to all rules for which a notice of rule making is published in the North Carolina Register on or after that date and to rule and Building Code changes that are initiated on or after that date and that are not subject to the rule-making procedures set out in Article 2A of Chapter 150B of the General Statutes.

Session Laws 1995, c. 507, s. 1.1, provides that c. 507 shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 fiscal biennium."

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Legal Periodicals. —

For article, "Mediation of Industrial Commission Cases," see 17 Campbell L. Rev. 395 (1995).

CASE NOTES

I. In General.

I. IN GENERAL.

The Industrial Commission did not exceed its authority by the repeal of the Blue Cross Blue Shield rule. — Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Applied in Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

Quoted in Timmons v. North Carolina DOT, 123 N.C. App. 456, 473 S.E.2d 356 (1996).

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this Article. The Commission may authorize the use of electronic submission of forms and other means of transmittal of forms and notices when it deems appropriate.

(b) The Commission shall tabulate the accident reports received from employers in accordance with G.S. 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest, and except for inspection by the Department of Labor and other State or federal agencies pursuant to subsections (d) and (e) of this section. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission shall:

(1) Cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Article, or with any State agency engaged in enforcing any laws to assure safety for employees, and

(2) Permit any such agency to have access to the records of the Commission.

In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this Article is being carried on, and to examine any tool, appliance, or machinery used in such employment.

(e) The Commission shall, upon written request from the Commissioner of Labor, provide from the Commission's records the following information from claims filed by employees, and from employer reports of injury to an employee required by G.S. 97-92:

(1) Name and business address of the employer;
(2) Type of business of the employer;
(3) Date the accident, illness, or injury occurred;
(4) Nature of the injury or disease reported; and
(5) Whether compensation for disability or medical expenses was paid to the injured employee.

Information provided to the Commissioner of Labor pursuant to this subsection, and to other State and federal agencies pursuant to subsection (d) of this section, shall be private and exempt from public inspection to the same extent that records of the Commission are so exempt. (1929, c. 120, s. 55; 1991 (Reg. Sess., 1992), c. 894, s. 2; 1993 (Reg. Sess., 1994), c. 679, s. 10.2.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

(a) If the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, they may enter into a memorandum of the agreement in the form prescribed by the Commission.

An agreement, however, shall be incorporated into a memorandum of agreement in regard to compensation: (i) for loss or permanent injury, disfigurement, or permanent and total disability under G.S. 97-31, (ii) for death from a compensable injury or occupational disease under G.S. 97-38, or (iii) when compensation under this Article is paid or payable to an employee who is incompetent or under 18 years of age.

The memorandum of agreement, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

(b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made. Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article. (1929, c. 120, s. 56; 1993 (Reg. Sess., 1994), c. 679, s. 3.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.2, which amended this section, was effective January 1, 1995, and applicable to claims pending on or filed after that date.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

And Approved Settlements Are Enforceable by Court Decree. —

An agreement for the payment of compensation approved by the Commission is enforceable by a court decree. Dalton v. Anvil Knitwear, 119 N.C. App. 275, 458 S.E.2d 251 (1995).

Commission May Not Set Aside a Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with § 97-17 and this section. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

A Form 21 agreement constitutes an award by the Commission and such an award is conclusive and binding as to all questions of fact. Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Cited in Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676 (1993).

§ 97-83. Commission is to make award after hearing.

If the employer and the injured employee or his dependents fail to reach an agreement in regard to benefits under this Article within 14 days after the employer has written or actual notice of the injury or death, or upon the arising of a dispute under this Article, either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date of a hearing, which shall he held as soon as practicable and shall notify the parties at issue of the time and place of such hearing. The hearing or hearings shall be held in the city or county where the injury occurred, unless otherwise authorized by the Commission. (1929, c. 120, s. 57; 1955, c. 1026, s. 12½; 1977, c. 743; 1993 (Reg. Sess., 1994), c. 679, s. 3.3.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.3, which amended this section, was effective January 1, 1995, and applicable to claims pending on or filed after that date.

CASE NOTES

The Commission used the wrong criteria when it denied defendants' request under this section to modify disability payments, because the employee's continued entitlement to benefits must be based on his post-injury earning capacity, not his post-injury wages. McGee v. Estes Express Lines, 125 N.C. App. 298, 480 S.E.2d 416 (1997).

Quoted in Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Cited in Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Phillips v. U.S. Air, Inc., 120 N.C. App. 538, 463 S.E.2d 259 (1995); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

§ 97-83.1. Facilities for hearings; security.

The senior resident superior court judge shall provide suitable facilities for the conduct of hearings under this Article in the county or counties within the judge's district at the time the Commission schedules hearings therein. The senior resident superior court judge shall, to the extent the judge determines necessary and practicable, provide or arrange for security at Commission hearings upon the request of a member or deputy of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 5.7.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective upon ratification. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

Deputy Commissioner May Set Aside Opinion and Award. — Where, in order to allow defendants to depose a physician, the Deputy Commissioner entered an order to keep the record open, but before defendants had an opportunity to depose the physician, the Deputy Commissioner entered an Opinion and Award, this Act vested the Deputy Commissioner with the inherent authority to set aside his Opinion and Award once informed of the omission of the physician's testimony. Plummer v. Henderson Storage Co., 118 N.C. App. 727, 456 S.E.2d 886 (1995).

Quoted in Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

Cited in Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

§ 97-85. Review of award.

CASE NOTES

Deputy Commissioner's Findings of Fact Not Conclusive. — The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Upon appeal from a deputy commissioner's award, the Commission may receive further evidence regardless of whether it was newly discovered evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may weigh the evidence presented to the deputy commissioner and make its own determination as to the weight and credibility of the evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Failure of Commission to Review Evidence. — Without the depositions containing the medical evidence necessary to resolve the issues, the full Commission could not have determined what issues might have been raised by the evidence; therefore, before the full Commission attempted to address the merits of plaintiff's claim it should have requested the parties to submit the missing depositions. Slatton v. Metro Air Conditioning, Inc., 117 N.C. App. 226, 450 S.E.2d 550 (1994).

Plenary Powers of Commission to Review Awards. —

In accord with second paragraph in the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission to Decide All Matters in Controversy. — When the matter is "appealed" to the full commission pursuant to this section, it is the duty and responsibility of the full commission to decide all of the matters in controversy between the parties. Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

Credibility Determinations. — Although the full Industrial Commission has the power to review determinations made by deputy commissioners, when the Commission reviews a credibility determination on a cold record and reverses it without considering that the hearing officer may have been in a better position to make such an observation, it has committed a manifest abuse of its discretion. Sanders v. Broyhill Furn. Indus., 124 N.C. App. 637, 478 S.E.2d 223 (1996).

Substitution of Commissioners on Panel. — Although there is no express statutory authority for the substitution of two Commissioners, neither is there a statutory provision in the Workers' Compensation Act expressly prohibiting such action, and if the legislature intended such restrictions on the Commissioner's authority, they would have expressly provided for such. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Construction with Other Sections. — Where plaintiff's motion for reconsideration was made after the 15 days allowed under this section, Rule 60(b) merely requires that a motion for relief from the judgment be filed within a reasonable time. Thus, the Commission should have considered the motion as a Rule 60(b) motion for relief from the judgment. Jones v. Yates Motor Co., 121 N.C. App. 84, 464 S.E.2d 479 (1995).

Taking of Additional Evidence on Review. —

The party against whom an award has been made does not have a substantive right to require the Full Commission to hear new or additional testimony. It may, and should, do so if the due administration of justice requires. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission's power to receive additional evidence is a plenary power to be exercised in the sound discretion of the Commission. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Commission may decide to exclude evidence which it has previously seen fit to hear, where the decision to take additional evidence is discretionary in nature and neither party has put forth good cause for such evidence to be considered. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Where it was within the Commission's power to ask for additional medical evidence, it was also within its power to exclude such evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Denial of Motion Upheld. — Where new evidence, testimony by a private investigator, was the same type of evidence that defendants introduced at the first hearing and the testimony did not provide any new revelations regarding plaintiff's disability, defendants suffered no prejudice by the Commission's denial of their motion to consider the new evidence. Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

Waiver of Right to Remand. — Where plaintiff had not assigned as error the failure of the Industrial Commission to afford him the review to which he was entitled under this section, and where plaintiff failed to argue that he was prejudiced in any way by any error upon the part of the full Commission, remand was not required. Faircloth v. North Carolina DOT, 106 N.C. App. 303, 416 S.E.2d 409 (1992).

Failure of Commission to Make Findings and Conclusions. — The Industrial Commission failed to carry out its statutory duties pursuant to this section by not making its own findings of fact and conclusions of law to support its disposition of plaintiff's claim. However, despite the failure of the Commission to make its own findings and conclusions, there was no prejudice to plaintiff. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

For preferred format of Industrial Commission's review of awards by deputy commissioner, see Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Excusable Neglect. — The commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

Applied in Glynn v. Pepcom Indus., Inc., 122 N.C. App. 348, 469 S.E.2d 588 (1996).

Quoted in Agee v. Thomasville Furn. Prods., 119 N.C. App. 77, 457 S.E.2d 886 (1995).

Stated in Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991).

Cited in Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798 (1993); Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded in light of the 1991 amendment to § 97-77.*

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Court of Appeals, said appeal or certification shall operate on a supersedeas except as provided in G.S. 97-86.1, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Article. If the employer is a noninsurer, then the appeal of such employer shall not act as a supersedeas and the plaintiff in such case shall have the same right to issue execution or to satisfy the award from the property of the employer pending the appeal as obtains to the successful party in an action in the superior court.

When any party to an appeal from an award of the Commission is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, any member of the Commission or any deputy commissioner shall enter an order allowing said party to appeal from the award of the Commission without giving security therefor. The party appealing from the judgment shall, within 30 days from the filing of the appeal from the award, make an affidavit that he is unable by reason of his poverty to give the security required by law. The request shall be passed upon and granted or denied by a member of the Commission or deputy commissioner within 20 days from receipt of the affidavit specified above. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9; 1959, c. 863, s. 4; 1967, c. 669; 1971, c. 1189; 1975, c. 391, s. 15; 1977, c. 521, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 10.5; 1995 (Reg. Sess., 1996), c. 552, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to all appeals by indigents from an order of the Industrial Commission on or after that date, in the third paragraph, in the first sentence substituted "shall" for "may, in their discretion" preceding "enter an order", deleted "and that he is advised by a practicing attorney that there is error in the matters of law in the award of the Commission in said case" from the end of the second sentence, deleted the former third sentence, which read "The affidavit must be accompanied by a written statement from a practicing attorney of North Carolina that he has examined the affiant's case and is of the opinion that the decision of the Commission in said case is contrary to law," and deleted "and letter as" preceding "specified above" in the last sentence.

CASE NOTES

I. In General.
II. Review, Generally.
V. Scope of Review.

I. IN GENERAL.

Applied in Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Quoted in Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

Cited in Goins v. Sanford Furn. Co., 105 N.C. App. 244, 412 S.E.2d 172 (1992); Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); McAnelly v. Wilson Pallet & Crate Co., 120 N.C. App. 127, 460 S.E.2d 894 (1995); Walters v. Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995); Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

II. REVIEW, GENERALLY.

Appeal Lies Only from Final Order of Commission. —

Only from a final order or decision of the Industrial Commission is there an appeal of right to the Court of Appeals. Ledford v. Asheville Hous. Auth., 125 N.C. App. 597, 482 S.E.2d 544 (1997).

V. SCOPE OF REVIEW.

Discretion to Consider Excusable Neglect. — The commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

Court May Determine Whether There Is Any Evidence to Support Commission's Findings. —

A review of the record indicated there was competent evidence to support the Commission's findings of fact, and the findings of fact justified the Commission's legal conclusions. Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 468 S.E.2d 396 (1996).

OPINIONS OF ATTORNEY GENERAL

***Editor's Note.** — The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-86.2. Interest on awards after hearing.

CASE NOTES

Interest Properly Awarded. — Industrial Commission did not err in awarding interest on plaintiff's outstanding medical expenses pursuant to this section. Childress v. Trion, Inc., — N.C. App. —, 481 S.E.2d 697 (1997).

§ 97-88. Expenses of appeals brought by insurers.

CASE NOTES

Construction with Other Sections. — This section and § 97-88.1 are supplementary in nature. This section allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. By contrast, an award of attorney's fees under § 97-88.1 requires that the litigation be brought, prosecuted, or defended without reasonable ground. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under § 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff, and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under § 97.88.1, at the original hearing before the commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Fees Only for Portion of Case Attributable to Appeal. — Under this section, the Commission is empowered to award to the injured employee attorney's fees only for the portion of the case attributable to the insurer's appeal(s). Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under this section are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under GS 97.88.1, at the original hearing before the Commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Awards Upheld. —

Industrial Commission properly awarded attorney's fees upon finding defendants in violation of rules by terminating compensation without the Commission's approval, and by refusing to resume immediate payments following the deputy commissioner's order. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Industrial Commission did not abuse

its discretion in awarding plaintiff attorney fees for successfully defending his appeal. Childress v. Trion, Inc., — N.C. App. —, 481 S.E.2d 697 (1997).

Employee Was Entitled to Have Employer Pay Attorney's Fees. — Where defendant appealed the initial award of benefits from the deputy commissioner to the full Commission and then to the Court of Appeals, and both affirmed the award of benefits, the requirements of this section were satisfied, and the Commission could award plaintiff the costs, including attorney's fees, of defending those appeals to the full Commission and to the Court of Appeals. Estes v. North Carolina State Univ., 117 N.C. App. 126, 449 S.E.2d 762 (1994).

Applied in Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

Cited in Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

§ 97-88.1. Attorney's fees at original hearing.

CASE NOTES

Purpose. — The purpose of this section is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Construction with Other Sections. — Section § 97-88 and this section are supplementary in nature. Section 97-88 allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. By contrast, an award of attorney's fees under this section requires that the litigation be brought, prosecuted, or defended without reasonable grounds. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under § 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff, and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under § 97.88.1, at the original hearing before the commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Authority of Commission. — The Commission is authorized under this section to assess attorney's fees, and other costs, for the entire case, against a party prosecuting or defending a hearing without reasonable grounds. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Payment of Fees By Counsel. — The Industrial Commission erred in ordering that defendant's costs and attorney's fees be paid by plaintiff's counsel. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996).

The statutory language of this section does not expressly provide the Industrial Commission with the authority to assess costs and fees against a party's counsel. Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 474 S.E.2d 152 (1996).

Fees Upheld. — Industrial Commission properly awarded attorney's fees upon finding defendants in violation of rules by terminating compensation without the Commission's approval, and by refusing to resume immediate payments following the deputy commissioner's order. Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

Fees Denied. — Because the parties brought, prosecuted, or defended this matter with reasonable grounds, the Commission properly declined to award attorney's fees in this matter. Shaw v. UPS, 116 N.C. App. 598, 449 S.E.2d 50 (1994), aff'd per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under G.S. 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under this section, at the original hearing before the Commission. Brown v. Public Works Comm'n, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Applied in Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

Cited in Tharp v. Southern Gables, Inc., 125 N.C. App. 364, 481 S.E.2d 339 (1997).

§ 97-88.2. Penalty for fraud.

(a) Any person who willfully makes a false statement or representation of a material fact for the purpose of obtaining or denying any benefit or payment, or assisting another to obtain or deny any benefit or payment under this Article, shall be guilty of a Class 1 misdemeanor if the amount at issue is less than one thousand dollars ($1,000). Violation of this section is a Class H felony if the amount at issue is one thousand dollars ($1,000) or more. The court may order restitution.

(b) The Commission shall:

(1) Perform investigations regarding all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, and refer possible criminal violations to the appropriate prosecutorial authorities;
(2) Conduct administrative violation proceedings; and
(3) Assess and collect civil penalties and restitution.

(c) Any person who threatens an employee with criminal prosecution under the provisions of subsection (a) of this section for the purpose of coercing or attempting to coerce the employee into agreeing to compensation or agreeing to forgo compensation under this Article shall be guilty of a Class H felony.

(d) The Commission shall not be liable in a civil action for any action made in good faith under this section, including the identification and referral of a person for investigation and prosecution for an alleged administrative violation or criminal offense. Any person, including, but not limited to, an attorney, an employee, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) The Commission shall report annually to the General Assembly on the number and disposition of investigations involving claimants, employers, insurance company officials, officials of third-party administrators, insurance agents, attorneys, health care providers, and vocational rehabilitation providers. (1993 (Reg. Sess., 1994), c. 679, s. 7.1; 1995, c. 507, s. 25(a); 1997-353, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(c), made this section effective October 1, 1994, and applicable to violations occurring on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 25(b), appropriated funds to the Department of Commerce for the 1995-96 and 1996-97 fiscal years, to be used for the North Carolina Industrial Commission to implement s. 25(a), which amended subsection (b) of this section.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 fiscal biennium."

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to offenses occurring on or after that date, substituted "fraud" for "misrepresentation" in the catchline; in subsection (a) added "if the amount at issue is less than one thousand dollars ($1,000)" and added the next to last sentence; inserted "civil" in subdivision (b)(3); and in subsection (c) inserted "or agreeing to forgo compensation", and substituted "Class H felony" for "Class 1 misdemeanor."

§ 97-88.3. Penalty for health care providers.

(a) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed ten thousand dollars ($10,000):

(1) Submitting charges for health care that was not furnished;

(2) Fraudulently administering, providing, and attempting to collect for inappropriate or unnecessary treatment or services; or

(3) Violating the provisions of Article 28 of Chapter 90 of the General Statutes.

A penalty assessed by the Commission for a violation of subdivision (3) of this subsection is in addition to penalties assessed under G.S. 90-407.

(b) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed one thousand dollars ($1,000):

(1) Failing or refusing to timely file required reports or records;

(2) Making unnecessary referrals; and

(3) Knowingly violating this Article or rules promulgated hereunder, including treatment guidelines, with intention to deceive or to gain improper advantage of a patient, employee, insurer, or the Commission.

(c) A health care provider who knowingly charges or otherwise holds an employee financially responsible for the cost of any services provided for a compensable injury under this Article is guilty of a Class 1 misdemeanor.

(d) Any person, including, but not limited to, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) Information relating to possible violations under this section shall be reported to the Commission which shall refer the same to the appropriate licensing or regulatory board or authority for the health care provider involved.

(f) A hospital that relies in good faith on a written order of a physician in performing health care services shall not be subject to an administrative penalty in violation of this section. (1993 (Reg. Sess., 1994), c. 679, s. 7.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(c), made this section effective October 1, 1994, and applicable to violations occurring on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

(a) Fees for attorneys and charges of health care providers for medical compensation under this Article shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case. Except as provided in G.S. 97-26(g), a request for a specific prior approval to charge shall be submitted to the Commission for each such fee or charge.

(b) Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or the court, as provided in subsection (c), or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a Class 1 misdemeanor.

(c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

The Commission may deny or reduce an attorney's fees upon proof of solicitation of employment in violation of the Rules of Professional Conduct of the North Carolina State Bar.

(d) Provided, that nothing contained in this section shall prevent the collection of such reasonable fees of physicians and charges for hospitalization as may be recovered in an action, or embraced in settlement of a claim, against a third-party tort-feasor as described in G.S. 97-10.2.

(e) A health care provider shall not pursue a private claim against an employee for all or part of the costs of medical treatment provided to the employee by the provider unless the employee's claim or the treatment is finally adjudicated not to be compensable or the employee fails to request a hearing after denial of liability by the employer. Notwithstanding subsequent denial of liability or adjudication that the condition treated was not compensable, the insurer shall be liable as provided in G.S. 97-26 to providers whose services have been authorized by the insurer or employer. The statute of limitations applicable to a provider's claim for payment shall be tolled during the period the compensability of a claim or liability for particular treatment remains an issue in a compensation case. (1929, c. 120, s. 64; 1955, c. 1026, s. 4; 1959, cc. 1268, 1307; 1973, c. 520, s. 4; 1981, c. 521, s. 4; 1991, c. 703, s. 6; 1993, c. 539, s. 680; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 9.1.)

Editor's Note. —

Session Laws 1993, c. 539, s. 680, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

The authority to approve hospital charges under subsection (a) is provided to ensure that hospitals do not provide services not reasonably required to effect a cure or give relief or tend to lessen the period of disability, and that hospital charges therefor do not exceed the prevailing community charge described therein. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less only the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-91. Commission to determine all questions.

Legal Periodicals. — For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.

(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof as provided in G.S. 97-22 of an injury to an employee, causing his absence from work for more than one day or charges for medical compensation exceeding the amount set by the Commission, a report thereof shall be made in writing and mailed or transmitted to the Commission in the form approved by the Commission for this purpose.

(b) The records of the Commission, insofar as they refer to accidents, injuries, and settlements shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of 60 days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer and name, age, sex, and wages and occupation of the injured employee, and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars ($5.00) and not more than twenty-five dollars ($25.00) for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty.

(f) Any bill, report, application, and document of every nature and kind, which is required or permitted by Commission rules to be transmitted to the Commission by electronic media or is recorded among the Commission records on computer disk, optical disk, microfilm, or similar media and which is produced or reproduced in written form in the normal course of business or is certified as a true and accurate copy of the data recorded at the Commission in the normal course of its business shall be treated as a signed original in all uses before the Commission and as a duplicate within the meaning of Rule 1003 of the North Carolina Rules of Evidence. (1929, c. 120, s. 66; 1945, c. 766; 1991, c. 703, s. 9; 1991 (Reg. Sess., 1992), c. 894, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 10.8.)

CASE NOTES

Cited in Smallwood v. Eason, 123 N.C. App. 661, 474 S.E.2d 411 (1996).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.

(a) Every employer subject to the provisions of this Article relative to the payment of compensation shall either:

(1) Insure and keep insured his liability under this Article in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized; or

(2) Repealed by Session Laws 1997-362, s. 5, effective December 1, 1997.

(3) Obtain a license from the Commissioner of Insurance under Article 5 of this Chapter or under Article 47 of Chapter 58 of the General Statutes.

(b) through (d) Repealed by Session Laws 1997-362, s. 5, effective December 1, 1997.

(e) Every employer who is in compliance with the provisions of subsection (a) of this section shall post in a conspicuous place in places of employment a notice stating that employment by this employer is subject to the North Carolina Workers' Compensation Act and stating whether the employer has a policy of insurance against liability or qualifies as a self-insured employer. In the event the employer allows its insurance to lapse or ceases to qualify as a self-insured employer, the employer shall, within five working days of this occurrence, remove any notices indicating otherwise. (1929, c.

120, s. 67; 1943, c. 543; 1973, c. 1291, s. 12; 1979, c. 345; 1983, c. 728; 1985, c. 119, s. 1; 1993, c. 120, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 679, s. 8.2; 1995, c. 193, s. 64; c. 471, s. 1; 1997-362, s. 5.)

Editor's Note. — This section was amended by Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.2, in the coded bill drafting format provided by § 120-20.1. However, the section as amended by that act did not include the amendments to subsections (b) and (d) by Session Laws 1993, c. 120, ss. 1 and 2. The section has been set out above at the direction of the Revisor of Statutes.

Session Laws 1995, c. 193, s. 67 contains a severability clause.

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, rewrote this section.

CASE NOTES

General Contractor Liable for Subcontractor's Injuries. — Where, prior to the time of subcontracting the performance of roofing work, the general contractor did not require from the subcontractor, plaintiff, a certificate of insurance, and general contractor did not obtain from the Industrial Commission a certificate stating that plaintiff had complied with this section, the general contractor was liable for plaintiff's injuries pursuant to § 97-19 as it existed at the time of plaintiff's accident. Southerland v. B.V. Hedrick Gravel & Sand Co., 345 N.C. 739, 483 S.E.2d 150 (1997).

Stated in N.C. Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996).

Cited in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994); Nicholson v. Adkins, 183 Bankr. 702 (Bankr. M.D.N.C. 1995); Patterson v. Markham & Assocs., 123 N.C. App. 448, 474 S.E.2d 400 (1996).

§ 97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; criminal penalties for failure to secure payment of compensation.

(a) Every employer subject to the compensation provisions of this Article shall file with the Commission, in form prescribed by it, as often as the Commission determines to be necessary, evidence of its compliance with the provisions of G.S. 97-93 and all other provisions relating thereto.

(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one hundred dollars ($100) for each day of such refusal or neglect, and until the same ceases; and the employer shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article or at law at the election of the injured employee.

The penalty herein provided may be assessed by the Industrial Commission administratively, with the right to a hearing if requested within 30 days after notice of the assessment of the penalty and the right of review and appeal as in other cases. Enforcement of the penalty shall be made by the Office of the Attorney General.

(c) Any employer required to secure the payment of compensation under this Article who willfully fails to secure such compensation shall be guilty of a Class H felony. Any employer required to secure the payment of compensation under this Article who neglects to secure the payment of compensation shall be guilty of a Class 1 misdemeanor.

(d) Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, willfully fails to bring the employer in compliance, shall be guilty of a Class H felony. Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, neglects to bring the employer in compliance, shall be guilty of a Class 1 misdemeanor. Any person who violates this subsection may be assessed a civil penalty by the Commission in an amount up to one hundred percent (100%) of the amount of any compensation due the employer's employees injured during the time the employer failed to comply with G.S. 97-93.

(e) Notwithstanding the provisions of G.S. 97-101, the Commission may suspend collection or remit all or part of any civil penalty imposed under this section on condition that the employer or person pays the compensation due and complies with G.S. 97-93. (1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499; 1973, c. 1291, s. 13; 1985, c. 119, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 54; 1987, c. 729, s. 17; 1993, c. 539, s. 681; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.1; 1997-353, s. 2.)

Editor's Note. — Session Laws 1993, c. 539, s. 681, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.1, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective October 1, 1994, and applicable to violations occurring on or after that date.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, and applicable to offenses occurring on or after that date, in the catchline inserted "criminal penalties for" and deleted "a misdemeanor" from the end; substituted "the employer" for "he" in subsection (b); in subsection (c) substituted "fails" for "refuses or neglects", substituted "Class H felony" for "Class 1 misdemeanor", added the last sentence; in subsection (d) substituted "willfully fails" for "wilfully and intentionally refuses or neglects", substituted "Class H felony" for "Class 1 misdemeanor and", added the second sentence, inserted "Any person who violates this subsection"; added the subsection (e) designation; and in subsection (e) substituted "any civil penalty imposed under this section" for "the civil penalty", and inserted "or person."

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

Applied in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.

CASE NOTES

Construction with § 1-440.2. — This section provides a further action in which attachment may be had, and which must be read in pari materia with § 1-440.2. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

An employer must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Employer's lack of workers' compensation insurance does not bar an employee's remedy through workers' compensation. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Attachment. — This section merely provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal; as such, plaintiff's affidavit must meet one of the grounds for attachment listed in §§ 1-440.2 and 1-440.11. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

The rights of a plaintiff in an action under this section are the same as those of any other plaintiff in a civil action. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-96: Repealed by Session Laws 1997-362, s. 7, effective December 1, 1997.

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.

(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this Article. No corporation, association or organization shall enter into any such policy of insurance unless its form shall have been approved by the Commissioner of Insurance. No policy form shall be approved unless the same shall provide a 30-day prior notice of an intention to cancel same by the carrier to the insured by registered mail or certified mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on 10 days' written notice to the insured, and the insured may cancel the policy on 10 days' written notice to the carrier. Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed.

(b) This Article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1943, c. 170; 1945, c. 381, s. 1; 1959, c. 863, s. 5; 1967, c. 1218; 1993, c. 504, s. 31.)

CASE NOTES

There is no requirement that the notice of intent to cancel due to nonpayment of premium be sent by registered or certified mail. Wilson v. Claude J. Welch Bldrs. Corp., 115 N.C. App. 384, 444 S.E.2d 628 (1994).

Evidence of Receipt of Notice. — In dispute between insurance companies where there was evidence that one insurer sent employer, by certified mail, a properly addressed, postage pre-paid notice of its intent to cancel the workers' compensation insurance policy, however, there was no evidence that employer's agent, his secretary whose duties included handling the mail, did not receive the letter, the inference created by the establishment of the prima facie case, that the letter was received, was not rebutted. Wilson v. Claude J. Welch Bldrs. Corp., 115 N.C. App. 384, 444 S.E.2d 628 (1994).

Cited in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices.

(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this Article, shall be fair, reasonable, and adequate.

(b) Each insurance carrier shall report to the Commissioner of Insurance, in accordance with rules adopted by the Commissioner of Insurance, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for this purpose the Commissioner of Insurance may inspect the books and records of any insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every insurer under this Article, every employer carrying its own risk under G.S. 97-93, and every group of employers that has pooled the employers' liabilities under G.S. 97-93 is subject to the premiums tax levied in Article 8B of Chapter 105 of the General Statutes.

(d) through (f). Repealed by Session Laws 1995, c. 360, s. 1, effective January 1, 1996.

(g) Any person who acts or assumes to act as agent for any insurance carrier whose authority to do business in this State has been suspended, while the suspension remains in force, who neglects or refuses to comply with any of the provisions of this section, or who willfully makes a false or fraudulent statement of the business or condition of any insurance carrier, is guilty of a Class 2 misdemeanor.

(h) Whenever by this Article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the notice may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of the insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer of the carrier in the United States, or to the Commissioner of Insurance.

(i) through (k). Repealed by Session Laws 1995, c. 360, s. 1, effective January 1, 1996. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13; 1977, c. 828, s. 7; 1985, c. 119, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 13; 1989, c. 647, s. 1; 1993, c. 539, s. 682; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 360, s. 1(h).)

Editor's Note. — Session Laws 1993, c. 539, s. 682, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 40, s. 1, effective May 5, 1993, provides: "All insurers writing workers' compensation insurance in this State and groups that self-insure their workers' compensation liabilities in this State, shall file with the commissioner by October 1, 1993, their loss control and accident prevention consultation services plans."

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, rewrote this section.

§ 97-101. Collection of fines and penalties.

CASE NOTES

Cited in McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994).

ARTICLE 3.

Security Funds.

§§ 97-105 through 97-122: Repealed by Session Laws 1991 (Regular Session, 1992), c. 802, s. 12, as amended by Session Laws 1991 (Regular Session, 1992), c. 1030, s. 51.3, effective January 1, 1993.

Cross References. — As to disposition of funds in the Stock Workers' Compensation Security Fund and the Mutual Workers' Compensation Security Fund, see §§ 58-48-105 through 58-48-130.

ARTICLE 4.

North Carolina Self-Insurance Guaranty Association.

§ 97-130. Definitions.

As used in this Article:

(1) "Association" means the North Carolina Self-Insurance Guaranty Association established by G.S. 97-131.

(2) "Board" means the Board of Directors of the Association established by G.S. 97-132.

(3) "Commissioner" means the North Carolina Commissioner of Insurance.

(4) "Covered claim" means an unpaid claim against an insolvent self-insurer that relates to an injury that occurs while the self-insurer is a member of the Association and that is compensable under this Chapter.

(5) "Fund" means the North Carolina Self-Insurance Guaranty Fund established by G.S. 97-133.

(6) "Member self-insurer" or "member" means a self-insurer which is authorized by the Commissioner to self-insure pursuant to G.S. 97-93 and G.S. 97-94.

(7) "Plan" means the Plan of Operation authorized by G.S. 97-134.

(8) "Self-insurer" means either: (i) an individual employer who has demonstrated under G.S. 97-93 the financial ability to directly pay compensation in the amounts and manner and when due as provided in this Chapter or (ii) a group of two or more employers who have agreed to pool their liabilities under this Chapter pursuant to G.S. 97-93. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 1; 1997-362, s. 8.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, substituted "G.S. 97-93 and G.S. 97-94" for "G.S. 97-93, 97-94 and 97-96" in subdivision (6).

§ 97-131. Creation.

(a) There is created a nonprofit unincorporated legal entity to be known as the North Carolina Self-Insurance Guaranty Association. The Association is to provide mechanisms for the payment of covered claims under self-insurance coverage, to avoid excessive delay in payment, to avoid financial loss to claimants because of the insolvency of a self-insurer, and to assist, when called upon to do so by the Commissioner, in the detection of self-insurer insolvencies.

(b) All individual and group self-insurers shall be and remain members of the Association as a condition of authority to self-insure in this State under G.S. 97-93. The Association shall perform its functions under a Plan of Operation established or amended, or both, by the Board and approved by the Commissioner, and shall exercise its powers through the Board.

(1) A self-insurer shall be deemed to be a member of the Association for purposes of another self-insurer's insolvency, as defined in G.S. 97-135, when:
  a. The self-insurer is a member of the Association when an insolvency occurs, or
  b. The self-insurer has been a member of the Association at some point in time during the 12-month period immediately preceding the insolvency in question.

(2) A self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs.

(3) In determining the membership of the Association pursuant to subdivisions (1) and (2) of this subsection for any date after the effective date of this Article, no employer or group of employers claiming self-insurer status may be deemed to be a member of the Association on any date after the effective date of this Article, unless that employer or group of employers is at that time authorized as a self-insurer by the Commissioner pursuant to G.S. 97-93 and G.S. 97-94. (1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, s. 2; 1997-362, s. 9.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, substituted "G.S. 97-93 and G.S. 97-94" for "G.S. 97-93, 97-94, and 97-96" in subdivision (b)(3).

§ 97-133. Powers and duties of the Association.

(a) The Association shall:

(1) Obtain from each member self-insurer and file with the Commissioner individual reports specifying the aggregate benefits each member paid during the previous calendar year, and the annual standard premium that would have been paid by the individual member self-insurer during the previous calendar year, pursuant to manual rates established by the North Carolina Rate Bureau and using the experience rating procedure approved by the Commissioner for that member self-insurer or the annual premium collected by each group member self-insurer during the prior calendar year. These reports shall be due on or before July 15 following the close of that calendar year, except that this deadline may be extended by the Commissioner for up to three additional months for good cause shown.

(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to one-quarter of one percent (0.25%) of the annual standard premium that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual standard premium for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual standard premium. Each group member self-insurer shall be annually assessed an amount equal to one-quarter of one percent (0.25%) of the annual premium collected by the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall be credited toward the tax paid by self-insurers under Article 8B of Chapter 105 of the General Statutes.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual standard premium shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivisions a. and b. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association.

(3) Administer a fund, to be known as the North Carolina Self-Insurance Guaranty Fund, which shall receive the assessments required in subdivision (2) of this subsection. Once the Fund reaches five million dollars ($5,000,000), no further assessments shall be made except initial assessments of new member self-insurers that are required to be made in subdivision (2)d. of this subsection. Assessments may be subsequently made only to maintain the Fund at a level of five million dollars ($5,000,000). In its discretion, the Board may determine that the assets of the Fund should be segregated, or, that a separate accounting shall be made, in order to identify that portion of the Fund which represents assessments paid by individual self-insurers and that portion of the Fund which represents assessments paid by group self-insurers. If the Board determines to segregate the Fund in this manner, the Association shall thereafter pay covered claims against individual member self-insurers from that portion of the Fund which represents assessments against individual self-insurers and shall thereafter pay covered claims against group member self-insurers from that portion of the Fund which represents assessments against group self-insurers. The cost of administration incurred by the Association shall be borne by the Fund and the Association is authorized to secure reinsurance and bonds and to otherwise invest the assets of the Fund to effectuate the purpose of the Association, subject to the approval of the Commissioner. All earnings from investment of Fund assets shall be placed in or credited to the Fund.

The Association may purchase primary excess insurance from an insurer licensed by the Commissioner for the appropriate lines of authority to defray its exposure to loss occasioned by the default of one of its members. The terms of any excess insurance so purchased shall be limited to providing coverage of liabilities which exceed the Fund's assets after the payment by member self-insurers of the maximum post-insolvency assessment provided in subdivision (c)(1) of this section herein and the Association shall fund any such purchase by levying a special assessment on its members for this purpose or by application of any unencumbered earnings of the Fund or any other available funds. The Association may obtain from each member any information the Association may reasonably require in order to facilitate the securing of this primary excess insurance. The Association shall establish reasonable safeguards designed to insure that information so received is used only for this purpose and is not otherwise disclosed;

(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. The Association shall pay claims against a self-insurer that are

not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article.

(5) After paying any claim resulting from a self-insurer's insolvency, be subrogated to the rights of the injured employee and dependents and be entitled to enforce liability against the self-insurer by any appropriate action brought in its own name or in the name of the injured employee and dependents;

(6) Assess the Fund in an amount necessary to pay only:
   a. The obligations for the Association under this Article subsequent to an insolvency;
   b. The expenses of handling covered claims subsequent to an insolvency;
   c. The cost of examinations under G.S. 97-137; and
   d. Other expenses authorized by this Article;

(7) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation; and deny all other claims. The Association may review settlements to which the insolvent self-insurer was a party to determine the extent to which such settlements may be properly contested;

(8) Notify such persons as the Commissioner directs under G.S. 97-136;

(9) Handle claims through its employees or through one or more self-insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but designation of a member self-insurer as a servicing facility may be declined by such self-insurer;

(10) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association;

(11) Pay the other expenses of the Association authorized by this section; and

(12) Establish in the Plan a mechanism to calculate the assessments required by subdivisions (1), (2), and (3) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.

(b) The Association may:

(1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association;

(2) Borrow funds necessary to effect the purposes of this Article in accord with the Plan;

(3) Sue or be sued;

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this section; and

(5) Perform such other acts as are necessary or proper to effectuate the purpose of this section.

(c) In the event that the assets of the Fund are not sufficient to pay the obligations of the Association, then the Association shall impose an additional assessment upon its members, which shall be known as a post-insolvency assessment which shall be imposed as follows:

(1) Each individual member self-insurer shall be assessed in an amount not to exceed two percent (2%) each year of the annual standard premium that would have been paid by that member self-insurer during the prior calendar year. The assessments of each individual member self-insurer shall be in the proportion that the annual standard premium of the individual member self-insurer for the premium calendar year bears to the annual standard premium of all individual member self-insurers for the preceding calendar year. For group member self-insurers, the assessment shall not exceed two percent (2%) each year the annual premium collected by that group member self-insurer during the prior calendar year. The assessments of each group member self-insurer shall be in the proportion that the annual collected premium of the group member self-insurer for the premium calendar year bears to the annual collected premium of all group member self-insurers for the preceding calendar year.

(2) Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

(3) The Association may exempt or defer, in whole or in part, the assessment of any member self-insurer, if the assessment would cause that member's financial statement to reflect liabilities in excess of assets.

(4) Delinquent assessments, except as provided in subdivision (3) of this subsection, shall bear interest at the rate to be established by the Board, but not to exceed the discount rate of the Federal Reserve Bank, Richmond, Virginia, on the due date of the assessment, plus four percent (4%) annually, computed from the due date of the assessment.

(5) The Association shall establish in the Plan a mechanism to calculate the assessments required by subdivision (1) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.

(d) No individual member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual standard premium that would have been paid by that individual member self-insurer during the prior calendar year. No group member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual premium collected by that group member self-insurer during the prior calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. There shall be established in the Plan a mechanism to calculate the assessments required by this section by a simple and equitable means to convert from policy or fund years that are different from a calendar year. (1985 (Reg. Sess., 1986), c. 928, s. 1(a); 1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, ss. 4-10; 1989, c. 485, s. 27; 1995, c. 533, s. 1; 1997-475, ss. 2.3, 2.4.)

Editor's Note. — Session Laws 1995, c. 533, s. 1, which amended this section, was effective for taxable years beginning on or after January 1, 1995.

Effect of Amendments. — The 1997 amendment, effective September 4, 1997, substituted "Article 8B of Chapter 105 of the General Statutes" for "G.S.

105-228.5 and G.S. 97-100" in subdivision (a)(2)a.; and deleted "provided that any assessments made to pay such claims may be credited towards the tax paid by the self-insurers under G.S. 97-100" at the end of subdivision (a)(4).

§ 97-143. Use of deposits made by insolvent member self-insurers.

After the Commissioner has notified the Association, under G.S. 97-136(a), that a member is insolvent, the Commissioner shall assign and deliver to the Association, and the Association is authorized to expend the deposit made by the insolvent member under G.S. 58-47-90 or G.S. 97-185, to the extent the deposit is needed by the Association to pay covered claims against the insolvent member as required by this Article, and to the extent the deposit is needed to pay expenses of the Association relating to covered claims against the insolvent member. The Association shall account to the Commissioner and the insolvent member or its successor for all deposits received from the Commissioner under this section. (1991, c. 644, s. 25; 1997-362, s. 6.)

Effect of Amendments. — The 1997 amendment, effective December 1, 1997, substituted "under G.S. 58-47-90 or G.S. 97-185" for "pursuant to G.S. 97-93(b)", and deleted "the premium taxes owed by" following "covered claims against."

ARTICLE 5.

Individual Employers.

§ 97-165. Definitions.

As used in this Article:

(1) "Act" means the Workers' Compensation Act established in Article 1 of this Chapter.

(2) "Certified audit" means an audit on which a certified public accountant expresses his or her professional opinion that the accompanying statements fairly present the financial position of the self-insurer, in conformity with generally accepted accounting principles as considered necessary by the auditor under the circumstances.

(3) "Certified public accountant" or "CPA" means a CPA who is in good standing with the American Institute of Certified Public Accountants and in all states in which the CPA is licensed to practice. A CPA shall be recognized as independent as long as the CPA conforms to the standards of the profession, as contained in the Code of Professional Ethics of the American Institute of Certified Public Accountants and Rules and Regulations and Code of Ethics and Rules of Professional Conduct of the North Carolina State Board of Certified Public Accountant Examiners, or similar code. The Commissioner may hold a hearing to determine whether a CPA is independent and, considering the evidence presented, may rule that the CPA is not independent for purposes of expressing an opinion on the GAAP financial statement and require the individual to replace the CPA with another whose relationship with the individual is independent within the meaning of this definition.

(4) "Commissioner" means the Commissioner of Insurance.
(5) "Corporate surety" means an insurance company authorized by the Commissioner to write surety business in this State.
(6) "GAAP financial statement" means a financial statement as defined by generally accepted accounting principles.
(7) "Hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a self-insurer is insolvent or, although not yet financially impaired or insolvent, is unlikely to be able to meet obligations with respect to known claims and reasonably anticipated claims or to pay other obligations in the normal course of business.
(8) "Management" means those persons who are authorized to direct or control the operations of a self-insurer.
(9) "Qualified actuary" means a member in good standing of the Casualty Actuarial Society or a member in good standing of the American Academy of Actuaries, who has been approved as qualified for signing casualty loss reserve opinions by the Casualty Practice Council of the American Academy of Actuaries, and is in compliance with G.S. 58-2-171.
(10) "Self-insurer" means a single employer who retains liability under the Act and is licensed under this Article. (1997-362, s. 4.)

Editor's Note. — Session Laws 1997-362, s. 10, made this Article effective December 1, 1997.

§ 97-170. License applications; required information.

(a) No employer shall self-insure its workers" compensation liabilities under the Act unless it is licensed by the Commissioner under this Article.

(b) An applicant for a license as a self-insurer shall file with the Commissioner the information required by subsection (d) of this section on a form prescribed by the Commissioner at least 90 days before the proposed licensing date. No application is complete until the Commissioner has received all required information.

(c) Only an applicant whose employee base is actuarially sufficient in numbers and provides an actuarially appropriate spreading of risk and whose total fixed assets amount to five hundred thousand dollars ($500,000) or more may apply for a license. In judging the applicant's financial strength and liquidity relative to its ability to comply with the Act, the Commissioner shall consider the applicant's:
(1) Organizational structure and management;
(2) Financial strength;
(3) Source and reliability of financial information;
(4) Risks to be retained;
(5) Workers' compensation loss history;
(6) Number of employees;
(7) Claims administration;
(8) Excess insurance; and

(9) Access to excess insurance or reinsurance.

(d) The license application shall comprise the following information:

(1) Company name, organizational structure, location of principal office, contact person, organization date, type of operations within this State, management background, and addresses of all plants or offices in this State.

(2) Certified audited GAAP financial statements prepared by a CPA for the two most recent years. The financial statement formulation shall facilitate application of ratio and trend analysis.

(3) Evidence of the insurance required by G.S. 97-190.

(4) Demonstration, satisfactory to the Commissioner, that the employee base is actuarially sufficient in numbers and provides an actuarially appropriate spreading of risk.

(5) For applicants with 20 or more full-time employees, a certificate or other evidence of safety inspection, satisfactory to the Commissioner, that certifies that all safety requirements of the Department of Labor have been met.

(6) Summary of workers' compensation benefits paid for the last three calendar years, as well as the total liability for all open claims within 30 days or some other period acceptable to the Commissioner not to exceed 90 days, before the filing of the application.

(7) Summary, by risk classification, of annual payroll and number of employees within the State.

(8) Book value of fixed assets located within the State.

(9) Proof of compliance with the claims administration provisions of Article 47 of Chapter 58 of the General Statutes.

(10) A letter of assent, stipulating the applicant's acceptance of membership status in the North Carolina Self-Insurance Guaranty Association under Article 4 of this Chapter.

(e) Every applicant shall execute and file with the Commissioner an agreement, as part of the application, in which the applicant agrees to deposit with the Commissioner cash, acceptable securities, or a surety bond issued by a corporate surety that will guarantee the applicant's compliance with this Article and the Act pursuant to G.S. 97-185. (1997-362, s. 4.)

§ 97-175. License.

(a) After the review of the application and all supporting materials, the Commissioner shall either grant or deny a license. If a license is denied, the Commissioner shall notify the applicant of the denial and inform the applicant of the deficiencies that constitute the basis for denial.

(b) If the deficiencies are resolved within 60 days after the Commissioner's notice of denial, the applicant shall be granted a license. The applicant may be granted additional time to remedy the deficiencies in its application. A request for an extension of time shall be made in writing by the applicant within 30 days after notice of denial by the Commissioner. If the requirements of this Article have not been met, the application shall be withdrawn or denied. (1997-362, s. 4.)

§ 97-180. Reporting and records.

(a) Every self-insurer shall submit, within 120 days after the end of its fiscal year, a certified audited GAAP financial statement, prepared by a CPA, for that fiscal year. The financial statement formulation shall facilitate the application of ratio and trend analysis.

(b) Every self-insurer shall submit within 120 days after the end of its fiscal year a certification from a qualified actuary setting forth the actuary's opinion relating to loss and loss adjustment expense reserves for workers' compensation obligations for each state in which the self-insurer does business. The certification shall show liabilities, excess insurance carrier and other qualifying credits, if any, and net retained workers' compensation liabilities. The qualified actuary shall present an annual report to the self-insurer on the items within the scope of and supporting the certification, within 90 days after the close of the self-insurer's fiscal year. Upon request, the report shall be submitted to the Commissioner.

(c) Every self-insurer shall submit within 120 days after the end of its fiscal year a report in the form of a sworn statement prescribed by the Commissioner, setting forth the total workers' compensation benefits paid in the previous fiscal year, as well as the total outstanding workers' compensation liabilities for each loss year, recorded at the close of its fiscal year for the net retained liability.

(d) Every self-insurer shall submit within 120 days after the end of its fiscal year annual payroll information. The report shall summarize payroll, by annual amount paid, and the number of employees, by classification, using the rules, classifications, and rates in the most recently approved Workers' Compensation and Employers' Liability Insurance Manual governing the audits of payrolls and the adjustments of premiums. Every self-insurer shall maintain true and accurate payroll records. These payroll records shall be maintained to allow for verification of the completeness and accuracy of the annual payroll report.

(e) Every self-insurer shall report promptly to the Commissioner changes in the names and addresses of the businesses it self-insures or intends to self-insure, as well as significant changes in the financial condition, including bankruptcy filings, and changes in its business structure, including its divisions, subsidiaries, affiliates, and internal organization. Any change shall be reported in writing to the Commissioner within 10 days after the effective date of the change. (1997-362, s. 4.)

§ 97-185. Deposits or surety bond.

(a) Every self-insurer shall deposit with the Commissioner an amount equal to twenty-five percent (25%) of the self-insurer's total undiscounted outstanding claim liability per the most recent certification from a qualified actuary as required by G.S. 97-180(b), but not less than five hundred thousand dollars ($500,000), or such other amount as the Commissioner prescribes based on, but not limited to, the financial condition of the self-insurer and the risk retained by the self-insurer.

(b) A self-insurer organized and authorized before the effective date of this section shall have 24 months from the effective date of this section to comply with this section.

(c) Deposits received, changes to existing deposits, or deposits exchanged after the effective date of this section, shall comprise one or more of the following:

(1) Interest-bearing bonds of the United States of America.
(2) Interest-bearing bonds of the State of North Carolina, or of its cities or counties.
(3) Certificates of deposit issued by any solvent bank domesticated in the State of North Carolina that have a maturity of one year or greater.
(4) Surety bonds in a form acceptable to the Commissioner and issued by a corporate surety.
(5) Any other investments that are approved by the Commissioner.

(d) All bonds or securities that are posted as a security deposit shall be valued annually at market value. If market value is less than face value, the Commissioner may require the self-insurer to post additional securities. In making this determination, the Commissioner shall consider the self-insurer's financial condition, the amount by which market value is less than face value, and the likelihood that the securities will be needed to provide benefits.

(e) Securities deposited under this section shall be assigned to the Commissioner, the Commissioner's successors, assigns, or trustees, on a form prescribed by the Commissioner in a manner that renders the securities negotiable by the Commissioner. If a self-insurer is deemed by the Commissioner to be in a hazardous financial condition, the Commissioner may sell or collect, or both, such amounts that will yield sufficient funds to meet the self-insurer's obligations under the Act. Interest accruing on any negotiable security deposited under this Article shall be collected and transmitted to the self-insurer if the self-insurer is not in a hazardous financial condition.

(f) No judgment creditor, other than a claimant entitled to benefits under the Act, may levy upon any deposits made under this section.

(g) Securities held by the Commissioner under this section may be exchanged or replaced by the self-insurer with other securities of like nature and amount as long as the self-insurer is not in a hazardous financial condition. No release shall be effectuated until replacement securities or bonds of an equal value have been substituted. Any surety bond may be exchanged or replaced with another surety bond that meets the requirements of this section if 90 days“ advance written notice is given to the Commissioner. If a self-insurer ceases to self-insure or desires to replace securities with an acceptable surety bond or bonds, the self-insurer shall notify the Commissioner, and may recover all or a portion of the securities deposited with the Commissioner upon posting instead an acceptable special release bond issued by a corporate surety in an amount equal to the total value of the securities. The special release bond shall cover all existing liabilities under the Act plus an amount to cover future loss development and shall remain in force until all obligations under the Act have been discharged fully.

(h) If a self-insurer ceases to self-insure, no deposits shall be released by the Commissioner until the self-insurer has discharged fully all of the self-insurer's obligations under the Act.

(i) An endorsement to a surety bond shall be filed with the Commissioner within 90 days after the effective date of the endorsement. (1997-362, s. 4.)

§ 97-190. Excess insurance.

(a) Every self-insurer, as a prerequisite for licensure under this Article, shall maintain specific and aggregate excess loss coverage through an insurance policy. A self-insurer shall maintain limits and retentions commensurate with its risk. A self-insurer's retention shall be the lowest retention suitable for the self-insurer's exposures and level of annual premium. The Commissioner may require different levels, or waive the requirement, of specific and aggregate excess loss coverage consistent with the market availability of excess loss coverage, the self-insurer's claims experience, and the self-insurer's financial condition.

(b) An excess insurance policy required by this section shall be issued by either a licensed insurance company or an approved surplus lines insurance company and shall:

(1) Provide for at least 30 days' written notice of cancellation by registered or certified mail, return receipt requested, to the self-insurer and to the Commissioner.

(2) Be renewable automatically at its expiration, except upon 30 days" written notice of nonrenewal by certified mail, return receipt requested, to the self-insurer and to the Commissioner.

(c) Every self-insurer shall provide to the Commissioner evidence of coverage and any amendments within 30 days after their effective dates. Every self-insurer shall, at the request of the Commissioner, furnish copies of its excess insurance policies and amendments. (1997-362, s. 4.)

§ 97-195. Revocation of license.

(a) The Commissioner summarily may revoke a license if there is satisfactory evidence for the revocation. In determining whether to revoke a license summarily, the Commissioner may consider any or all of the following:

(1) Determination of insolvency by a court of competent jurisdiction.

(2) Institution of bankruptcy proceedings.

(3) If the self-insurer is in a hazardous financial condition.

(b) The Commissioner, upon at least 45 days' notice, may revoke a license if there is satisfactory evidence for the revocation. In determining whether to revoke a license under this subsection, the Commissioner may consider any or all of the following:

(1) Whether the self-insurer has experienced a material loss or deteriorating operating trends, or reported a deficit financial position.

(2) Whether any affiliate or subsidiary is insolvent, threatened with insolvency, or delinquent in payment of its monetary or any other obligation.

(3) Whether the self-insurer has failed to pay premium taxes pursuant to Article 8B of Chapter 105 of the General Statutes.

(4) Whether the self-insurer has failed to pay an assessment under G.S. 97-100.

(5) Contingent liabilities, pledges, or guaranties that either individually or collectively involve a total amount that in the Commissioner's opinion may affect a self-insurer's solvency.

(6) Whether the management of a self-insurer has failed to respond to the Commissioner's inquiries about the condition of the self-insurer or has furnished false and misleading information in response to an inquiry by the Commissioner.

(7) Whether the management of a self-insurer has filed any false or misleading sworn financial statement, has released a false or misleading financial statement to a lending institution or to the general public, or has made a false or misleading entry or omitted an entry of material amount in the filed financial information.

(8) Whether the self-insurer has experienced or will experience in the foreseeable future, cash flow or liquidity problems.

(9) Whether the self-insurer has not complied with the other provisions of this Article or the Act.

(10) Whether the self-insurer has failed to make proper and timely payment of claims as required by this Article.

(c) Any self-insurer subject to license revocation under subsection (a) or (b) of this section may request an administrative hearing before the Commissioner to review that order. If a hearing is requested, a notice of hearing shall be served, and the notice shall state the time and place of hearing and the conduct, condition, or ground on which the Commissioner based the order. Unless mutually agreed upon between the Commissioner and the self-insurer, the hearing shall occur not less than 10 days nor more than 30 days after notice is served and shall be either in Wake County or in some other place designated by the Commissioner. The Commissioner shall hold all hearings under this section privately unless the self-insurer requests a public hearing, in which case the hearing shall be public. The request for a hearing shall not stay the effect of the order. (1997-362, s. 4.)

§ 97-200. Claims administration.

(a) A self-insurer shall not utilize any claims adjuster unless the adjuster is licensed under G.S. 58-33-25.

(b) Every self-insurer shall comply with the provisions of Article 47 of Chapter 58 of the General Statutes that are related to claims administration. (1997-362, s. 4.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 1, 1997

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1997 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

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STATE OF NORTH CAROLINA

Department of Justice

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